88-1591

No.

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
*Petitioner,*

vs.

CITY OF BERKELEY,
a Municipal Corporation,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does the ripeness doctrine applicable to taking claims brought under the Just Compensation Clause of the Fifth Amendment require a landowner to submit a development application to a local agency even though the agency is legally unable to approve the application because the confiscatory terms of the governing voter-imposed zoning ordinance finally and authoritatively fix the type and intensity of development permitted on the property?

2. Can the Ninth Circuit's prevailing rule that the ripeness doctrine requires landowners to pursue administrative remedies which are "as practical matter futile" be reconciled with this Court's ripeness decisions, as adhered to in other circuits, that consider a claim ripe whenever the governmental entity has finally and authoritatively fixed the type and intensity of permitted development?

## PARTIES TO THE PROCEEDINGS AND RULE 28.1 LIST

The only parties to this proceeding are petitioner, Santa Fe Pacific Realty Corporation, a Delaware corporation, and respondent, the City of Berkeley, a municipal corporation. Santa Fe Land Improvement Company, a California corporation, the plaintiff and appellant in the courts below, was merged into Santa Fe Pacific Realty Corporation. Petitioner knows of the following additional entities within the meaning of Supreme Court Rule 28.1 that should be disclosed:

Santa Fe Southern Pacific Corporation, a Delaware corporation

Southern Pacific Company, a Delaware corporation

Santa Fe Natural Resources, Inc., a Delaware corporation

The Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation

Santa Fe Energy Partners, L.P., a Delaware corporation

Santa Fe Pacific Pipeline Partners, L.P., a Delaware corporation

Santa Fe Industries, a Delaware corporation.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

The petitioner, Santa Fe Pacific Realty Corporation (hereinafter "Santa Fe"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in August 29, 1988. Santa Fe's petition for rehearing in the Court of Appeals was denied on January 3, 1989.

## I

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported and is reprinted in the appendix at page A-26. The Court of Appeals orders requiring a response to the petition for rehearing and denying rehearing are set forth in the appendix at A-31 and A-32. The orders of the United States District Court for the Northern District of California dismissing the complaint are reprinted in the appendix at A-14 and A-25, and the district court's remarks from the bench setting forth the basis for its ruling are reprinted in the appendix at A-1. The district court's orders of dismissal are not reported.

## II

## JURISDICTION

Santa Fe commenced this action by filing a complaint in the United States District Court for the Northern District of California invoking federal jurisdiction under 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 1343; the Just Compensation and Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On August 26, 1987, the district court entered an order granting the respondent City of Berkeley's motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

Following a timely appeal by Santa Fe brought pursuant to 28 U.S.C. § 1291, the United States Court of Appeals for the Ninth Circuit entered a judgment and opinion on August 29, 1988, affirming the district court. A petition for rehearing was timely

filed and, after the Court of Appeals ordered opposition to the petition, the petition was denied on January 3, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## III

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provisions are relevant to this petition:

1. The Fifth Amendment to the United States Constitution:

> [N]or shall private property be taken for a public use without just compensation.

2. The Fourteenth Amendment, section 1, to the United States Constitution:

> No state shall deprive any person of life, liberty, or property without due process of law. . . .

## IV

## STATEMENT OF THE CASE

The Berkeley waterfront on San Francisco Bay has only two owners: one public—the City, and one private—Santa Fe. (CR 1 at 3:10-4:12, Exh. A)[1] Over the years the City has authorized extensive private commercial development for profit on its own

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[1] The statement of the case is drawn from Santa Fe's complaint which the district court was required to accept as true for purposes of a ruling under Federal Rule of Civil Procedure 12(b)(1). *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Citations to CR are to the Clerk's Record in the Court of Appeals. The control numbers following the CR citations are references to the relevant pleadings listed by number in the docket sheet of the district court. The page and line citations which follow are to the pleadings, or exhibits to the pleadings, referenced. Included in the appendix to this petition for the convenience of the Court is a map of the Berkeley Waterfront showing Santa Fe's and the City's property. (App.

68-acres of property, which is contiguous to Santa Fe's.[2] (CR 1 at 5:13-6:7) However, Santa Fe's dry land, covering 174 acres, remains undeveloped because the City has consistently rejected all of the numerous development plans, conceptual plans, and formal and informal development requests submitted by Santa Fe over a period of approximately twenty years. (CR 1 at 4:1-5, 6:8-11)

The reasons given for the City's repeated denials of Santa Fe's proposals have always been a pretext; the true reason has always been that the City was committed to preserving Santa Fe's property as open space without compensating Santa Fe. (CR 1 at 6:12-14, 23:26-24:8) Finally, in 1986, as a direct response to Santa Fe's most recent development efforts (which cost Santa Fe more than $4.5 million), the Berkeley electorate adopted Measure Q—an initiative ordinance whose express purpose was to preserve in perpetuity the bulk of Santa Fe's property as open space. (CR 1 at 22:3-23:2, 23:6-11) The unalterable terms of the ordinance are so restrictive that they preclude any economically viable development of Santa Fe's property. (App. A-44-A-49; CR 1 at 24:9-26) The net effect of Measure Q, which is directed solely at Santa Fe, is to preserve Santa Fe's property for public use without compensating Santa Fe. (CR 1 at 25:1-6) Because of Measure Q's confiscatory effect, Santa Fe asserted its constitutional rights in federal court. (CR 1)

### A. Over A Period Of Twenty Years Santa Fe Unsuccessfully Attempts To Secure The Right To Develop Its Berkeley Waterfront Property

In 1964, after Santa Fe publicly announced its intention to develop its waterfront property, the City of Berkeley adopted a Master Plan which designated Santa Fe's waterfront property as "an area to be studied" and which reserved the Berkeley shoreline

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at A-56) The map was attached to Santa Fe's complaint in the district court. (CR 1, Exh. A)

[2] The City has permitted construction of a 375-unit hotel, a convention complex, office buildings, restaurants, sailing clubs, a boat repair yard, and a 1,000 berth commercial marina on its own property. (CR 1 at 5:13-20)

(with the exception of the City's own property) "exclusively for public recreation." (CR 1 at 6:15-20) Although the City claimed it was exploring the possibility of acquiring Santa Fe's property for a public purpose, in fact no funding was then or has ever been obtained in the intervening twenty years to compensate Santa Fe for the City's actions prohibiting any reasonable economic use or development of Santa Fe's waterfront property. (CR 1 at 6:21-7:1, 18:15-21, 19:23-20:3, 25:1-6)

Thus, between 1964 and 1983, while expending millions of dollars, Santa Fe pursued every conceivable avenue available to it to obtain approval of some reasonable and economically viable use of its property. These attempts have taken a wide variety of forms over the years, and between 1981 and 1986 alone cost Santa Fe more than $4.5 million. (CR 1 at 23:6-11) From 1971 forward Santa Fe unsuccessfully submitted: (1) applications for development; (2) development proposals; (3) conceptual plans for waterfront development; (4) a major use permit application; and (5) two specific development applications for a hotel, an office building, and related tract map. (CR 1 at 7:2-16, 8:10-9:26, 11:16-13:3, 13:17-15:5) In connection with these proposals, Santa Fe offered to dedicate 100 percent of its submerged and tidal lands (505 acres) for public use; and as much as 50 percent of its dry property to open space. (CR 1 at 11:16-13:3) It made major financial and logistical contributions to environmental impact reports [CR 1 at 8:10-9:19, 13:17-23], and relied on continued representations by the City that cooperative planning efforts would result in a meaningful development agreement. (CR 1 at 13:17- 14:22) It also met on innumerable occasions with City officials over the years, each of whom continuously represented that Santa Fe's cooperation would lead to a satisfactory development agreement which would enable Santa Fe to engage in the reasonable development of its property. (CR 1 at 8:13-23)

In response to these good faith efforts by Santa Fe, the City has seized on one device after another to delay, ignore and ultimately reject each of the separate and detailed development proposals submitted. (CR 1 at 4:21-24, 6:15-19:3) The City has also acted in bad faith by consistently undermining all cooperative planning efforts to permit reasonably phased development of Santa Fe's

property and manipulating the process to ensure that Santa Fe's applications would ultimately be denied. (CR 1 at 8:13-23, 9:20-26) It has twice designated Santa Fe's property as an area "to be studied," without ever conducting any studies during the extended period when Santa Fe's property was being involuntarily preserved as open space. (CR 1 at 6:15-20, 7:19-24) In the same vein, in 1983, the City turned away Santa Fe's development efforts by failing to act on them and instead opening the matter up to a so-called "public planning process." (CR 1 at 9:20-26) However, the City never intended to utilize the "planning process" in a way that would permit reasonable development of Santa Fe's property. (CR 1 at 9:20-26) Alternatively, when the City chose to act on Santa Fe's development applications, it rejected them on sham grounds by labeling Santa Fe's submissions as "inadequate" or "incomplete," when in fact the submissions were extremely detailed and comprehensive. (CR 1 at 12:18-24, 12:20-26) When these sham denials no longer served the City's purpose, it enacted three successive moratoriums on any waterfront development and made the moratoriums applicable only to Santa Fe's property, but not to its own. (CR 1 at 15:20-16:6, 16:19-25, 17:16-23)

In the meantime, the City instructed its own environmental impact consultant to come up with a proposal which would allow Santa Fe only 500,000 square feet of development on the more than seven million square feet of land potentially available for development. (CR 1 at 16:26-17:4) When the City's consultant nonetheless determined that the minimal development that would allow Santa Fe to make economically viable use of its land was 705,000 square feet and submitted a report to that effect, the City rejected the recommendation, adopting instead an alternative of 565,000 square feet—or 20% less than that recommended by the consultant. (CR 1 at 17:24-18:18) Then in February of 1986, in response to Santa Fe's pending applications, the City prepared a "Waterfront Plan" amendment to the City's Master Plan and a "Specific Plan" for the waterfront aimed exclusively at Santa Fe's

property. (CR 1 at 18:22-26)[3] The admitted purpose of these plans was to formalize the City's longstanding policy that Santa Fe's land should be maintained as public open space and in an undeveloped state. (*See*, CR 1 at 18:22-26; CR 19, Exh. 2, p. 4; Exh. 3, p. 5)

The Waterfront Plan "designate[d] the Waterfront as an area primarily for recreational, open space, and ecological uses," and detailed in unusually precise terms the specific types, intensities, and locations of the severely limited private development it purported to permit. (CR 19, Exh. 2, p. 1) The Specific Plan in turn established the requirements for accomplishing the primary goal of the Waterfront Plan (setting aside the waterfront for public uses) and for controlling the minimal private development permitted by the Waterfront Plan. (CR 19, Exh. 3, pp. 5-12) The Specific Plan included "text and diagrams addressing the distribution, location and intensity of land uses, including open spaces within the plan area," as well as all infrastructure improvements. (CR 19, Exh. 3, p. 1) The various sections of the Specific Plan precisely depicted the types, intensities, locations and phases of development for the square footage that could be developed. (*Id.*, pp. 15-24) These highly detailed requirements and restrictions included the exact number, dimension, location, phasing and design of all land uses, buildings, roadways, bike paths, parking spaces, pedestrian routes, sewers and water drains, street facades, open-space areas, walls, fences, landscaping, signs, lighting and the like. (*Id.*)

The Plan also contained a pro-forma provision for permit applications which *prohibited* any application that deviated from, or was inconsistent with, its specific and detailed requirements. (*Id.*, §§ 7.3.1, 7.3.4b, 7.3.8a, pp. 70, 71, 74; *see also*, CR 18 at 15) Thus, no development could be permitted on Santa Fe's property that was inconsistent with the Specific Plan's terms. (*Id.*, pp. 70-72, 74)

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[3] California statutes require General or Master Plans and amendments for control of all land development. Cal. Gov. Code §§ 65300-65303, 65350. They also permit Specific Plans to implement such General or Master Plans. Cal. Gov. Code §§ 65450-65455.

### B. Measure Q Is Adopted By The Voters Of Berkeley In November Of 1986 In Order To Finally And Authoritatively Fix And Limit The Type And Intensity Of Development For Santa Fe's Waterfront Property

While the Specific Plan's terms expressly prohibited any development application that was inconsistent with its policies and standards, since the Specific Plan had been adopted by the City Council, it was at least theoretically subject to change by that body. In November of 1986, however, the voters took matters into their own hands and foreclosed any possibility of a change in the terms of the Specific Plan.

In the November, 1986 election, Measure P and Measure Q were placed on the ballot to be voted upon by Berkeley's electorate. (CR 1 at 20:9-15, 22:3-23:2)[4] Both were targeted directly and exclusively at Santa Fe's waterfront property, and each was drafted by interests hostile to Santa Fe as a response to Santa Fe's proposals to develop its waterfront property. (App. A-34, A-41, A-44, A-52) In their ballot argument against competing Measure P, the proponents of Measure Q described Santa Fe as a "greedy company" who had "continually tried to bully the city with lawsuits." (App. A-41) Measure Q, as drafted by the Sierra Club Waterfront Taskforce, was therefore intended to stop Santa Fe's supposed "bullying tactics" [*id.*] by:

> —Finding that it was in the public interest to preserve, protect, reclaim and/or restore [areas owned by Santa Fe (the Meadow, Brickyard and Beach)] in a natural, open and undeveloped form (App. A-44, § 1);
>
> —Requiring that the Meadow be maintained as open space with only one possible minor and economically unviable exception (App. A-45-A-46, § 3a);
>
> —Requiring that the Brickyard and the Beach be maintained as public open space with the exception of a 5,000 square-

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[4] For the convenience of the Court, the texts of Measures P and Q, and the ballot arguments in the official pamphlet submitted to the voters, all of which were the subject of judicial notice below, are reproduced in the appendix at A-33-A-55.

foot "nature interpretive center" permitted on the 29.2 acre Brickyard tract (App. A-46, § 3b);

—Restricting the total development of all Santa Fe's Waterfront property to no more than 565,000 square feet of building space (App. A-46, § 3(c)(2));

—Requiring the City's Master Plan, Waterfront and Specific Plans, and Zoning Ordinance to be amended to incorporate and conform to the policies set forth in Measure Q (App. A-47, § 4);

—Providing that the Waterfront Plan and Specific Plan be adopted by and incorporated into Measure Q (*Id.*); and

—Mandating that "[n]o part of this ordinance shall be amended or repealed, *except by a vote of the people.*" (App. A-48, § 7) (emphasis added).

Thus, a key purpose of Measure Q, as it was submitted to the voters, was to preclude Berkeley's City Council from amending the scope or intensity of the permitted uses specified in Measure Q. Indeed, Measure Q differed from Measure P primarily because Measure P left the extent of permissible development by Santa Fe to the City Council, whereas Measure Q did not permit the City Council to alter the uses specified in the ordinance. (App. A-51) As the proponents of Measure Q told the voters in the official voter pamphlet, Measure Q "[p]laces an absolute cap on all development on the privately owned lands at the waterfront." (*Id.*) The opponents of Measure Q (the backers of Measure P) agreed, pointing out that Measure Q "locked the City in" to the allowed development and that result could "only be undone by a future ballot measure. . . ." (App. A-53) Measure Q received the most votes at the general election and under California law was adopted as the ordinance controlling any proposed development on Santa Fe's waterfront property. (CR 1 at 23:3-5; CR 19 at 8- 10)

### C. Because The Maximum Development Permitted By Measure Q Is Confiscatory, Santa Fe Files Its Complaint Seeking Just Compensation

On March 2, 1987, Santa Fe filed a complaint in United States District Court for the Northern District of California, alleging constitutional claims for relief in: inverse condemnation for the taking of its property without just compensation; denial of its right to equal protection based on the unfairness in requiring Santa Fe to provide open space at its expense while the City enjoyed a profitable commercial use of its contiguous property; denial of due process for the arbitrary, wrongful, and unlawful preclusion of Santa Fe from the use of its property; and violations of 42 U.S.C. § 1983, based on the foregoing allegations. (CR 1 at 12, 25, 26, 27)

On May 22, 1987, the City filed a motion to dismiss for want of jurisdiction pursuant to Rule 12(b)(1), alleging that despite two decades of frustration culminating in the enactment of Measure Q, Santa Fe's complaint was not ripe for judicial review because Santa Fe had not made yet another development application and request for variance after the voters enacted Measure Q. (CR 11; CR 12) Santa Fe asked the district court to judicially notice the terms of Measure Q, and the Waterfront and Specific Plans that it incorporated, and argued that Measure Q was plainly intended by the voters to be the final and authoritative response to its many applications. (CR 18) Accordingly, no further applications were necessary because the definitive position of the City was known and the maximum development permitted by Measure Q was confiscatory. (*Id.*) After the City replied [CR 21], on August 3, 1987, the district court heard argument on the City's motion. (CR 22)

At the hearing the court indicated its belief that a futile application to the City should not be required under the ripeness doctrine, and that the terms of Measure Q did not appear to permit the City to act favorably on any development application by Santa Fe that did not comply with the requirements of Measure Q and the Waterfront and Specific Plans it incorporated. (App. A-11) The court also seemed to recognize that the City had pursued a course over many years designed "essentially [to]

forestall any finality requirement that the courts require. . . ." and acknowledged that Measure Q had indeed been enacted as a direct response to Santa Fe's efforts to develop its property. (App. App. A-9, A-11)

The district court refused, however, to take the next logical step and deny the motion because it perceived that the Ninth Circuit's then recently issued opinion in *Kinzli v. City Of Santa Cruz*, 818 F.2d 1449, amended by, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, ____ U.S. ____, 98 L.Ed.2d 861 (1988), reflected "a higher . . . frustration . . . quotient than some of us would tolerate." (App. A-12) The court interpreted *Kinzli* as requiring that an application and request for variance must always be filed with the responsible zoning authority in order to create a ripe dispute. (*Id.*) The court then applied *Kinzli* largely because of the City's attorneys' representation (despite the clear intent of the voters to the contrary) that the City Council had the ability to alter Measure Q's exacting requirements in response to a development application and a request for variance fron Santa Fe. (App. A-6, A-12) At the same time, the district court expressed concern and sympathy for Santa Fe's predicament, noting that "this has gone on, as in many other cases that we have, for years and years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and can never get into court." (App. A-12) The court thereafter filed its order dismissing the complaint [CR 23, 24] and Santa Fe's timely appeal followed. (CR 25)[5]

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[5] Neither the district court nor the Court of Appeals addressed Santa Fe's due process or equal protection arguments. (App. A-28-A-30) The district court also declined to reach a second prematurity argument urged by the City: that there existed an adequate and available state remedy which Santa Fe was required to pursue in state court prior to filing its complaint in federal court. (CR 23, n.3) *See, Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). However, this argument was without merit because there is no adequate and available state remedy in California for Santa Fe's principal claim of inverse condemnation. *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980); *Furey v. City Of Sacramento*, 780 F.2d 1448,

On August 29, 1989, the Court of Appeals affirmed the district court in an unpublished opinion [App. A-26] which accepted the proposition that Santa Fe must go through the formality of refiling yet another expensive and time-consuming development application and request for a variance to obtain a "final decision" after Measure Q, even though it conceded that:

> —All pre-Measure Q development applications for permitted uses under Berkeley's prior zoning ordinances had been rejected (App. A-27);
>
> —Measure Q endorsed highly detailed and technical requirements which severely limited development of the Waterfront and the Specific Plans (*Id.*);
>
> —Measure Q could not be amended except by a vote of the people (App. A-28); and
>
> —As a result of the passage of Measure Q, even if Santa Fe were to make another application, the futility of further administrative proceedings, "may be true . . . , as a practical matter." (App. A-29)

Santa Fe petitioned for rehearing and pointed out that the Ninth Circuit had erroneously applied the ripeness doctrine to relegate Santa Fe to the application process when it would serve no purpose to do so because the confiscatory development limits in voter-imposed Measure Q could not be amended by the City Council even if Santa Fe filed an application. Indeed, the petition noted that every case cited by the court to support its holding that this case was not ripe involved a zoning regulation or ordinance that gave the pertinent administrative body discretion to take some meaningful action in response to a development application or variance request submitted by the landowner. *E.g., MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (plaintiff could seek further administrative application and it appeared that requested development would be allowed to proceed); *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, ____ U.S. ____, 102

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1450 n.1 (9th Cir. 1986). The City accordingly did not pursue this argument on appeal and the appellate court likewise did not consider it.

L.Ed.2d 55 (1988) (rural lands category had eight groups of allowable uses and 42 groups of special uses); *Shelter Creek Development Corp. v. City Of Oxnard*, 838 F.2d 375 (9th Cir.), *cert. denied*, ____ U.S. ____, 102 L.Ed.2d 106 (1988) (undisputed that planning commission did not insist on strict compliance with general plan and variances were available to permit proposed development); *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449 (seven permitted uses in greenbelt category together with a catchall provision permitting unspecified "other uses"); *American Sav. & Loan Ass'n v. County Of Marin*, 653 F.2d 364 (9th Cir. 1981) (county could make provision for changes in density requirements and no precise limitations on density).

The petition for rehearing further pointed out that, by contrast, the record in this case established that the voter-imposed ordinance: (1) was not a part of a legislatively enacted general zoning ordinance designed to be implemented by an administrative body; (2) did not create a wide variety of multiple uses or provisions to vary density requirements that must be considered by an administrative body; (3) was specifically aimed only at one landowner's property; (4) was designed by its terms to control precisely and in minute detail the development of that property without vesting any discretion in an administrative body; and (5) applied its precise limits on the maximum permitted development in perpetuity without the possibility of any change by an administrative body until the voters indicated that such a change was appropriate. Thus, there was no room for any further meaningful administrative action under Measure Q and that was exactly the way the voters of the City of Berkeley wanted it. *See, City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-673 (1976). The petition concluded that there was, therefore, no basis upon which to dismiss the case on ripeness grounds under the controlling law.

The Ninth Circuit requested a response from the City [App. A-31], and in its response, the City conceded for the first time that Santa Fe need not seek a variance because a California Government Code provision (Section 65906) prohibits a landowner "from seeking a variance for uses other than those authorized by the applicable zoning ordinance." (Answer to Petition for Rehearing at p. 6) This concession was fatal to the City since it

recognized that Santa Fe's proposed uses and those of Measure Q are irreconcilable and that the City was without power to vary the terms of Measure Q to accommodate Santa Fe's proposed uses. If a variance request is futile, so too is a development application. Although Santa Fe had made precisely this argument in its briefing in the Court of Appeals, the Ninth Circuit nevertheless denied the petition for rehearing without comment on January 3, 1989. (App. A-32)

## V

## REASONS FOR GRANTING THE WRIT

### A. Introduction

This Court has never approached the ripeness doctrine in a mechanical manner, nor has it viewed the doctrine as a means to frustrate those who must deal with administrative agencies or those who seek to assert their constitutional rights. Rather, the Court—along with other circuits applying the Court's ripeness analysis—has simply directed federal courts to inquire whether the definitive position of the administrative agency is, for all practical purposes, known before determining whether a dispute with the agency is ripe for judicial scrutiny.

The dominant line of cases in the Ninth Circuit, as epitomized by this case, has followed a dramatically different path that cannot be reconciled with the flexible approach adopted by the Court and by other circuits. Even if the landowner's application for administrative relief would, as a practical matter, be futile, these Ninth Circuit cases mechanically hold that a development application and request for variance must nevertheless be filed. (App. at A-26) *E.g., Lai v. City And County Of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, ___ U.S. ___, 102 L.Ed.2d 586 (1988); *Lake Nacimiento Ranch v. San Luis Obispo County, supra*, 830 F.2d at 977; *Shelter Creek Development Corporation v. City Of Oxnard, supra*, 838 F.2d at 375; *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449. This restrictive reading of the ripeness doctrine, that mechanically requires one more application and request for variance no matter what, defeats

the ends of justice, undermines the orderly principles of adjudication the ripeness doctrine legitimately attempts to further, and creates a road map for governmental agencies to establish meaningless and prohibitively expensive obstacles to the resolution of landowners' constitutional claims.[6]

This Court would no doubt be the first to recognize that a landowner's fundamental right to pursue a claim for just compensation for the taking of its property should not be made to turn on the circuit (or panel within the circuit) where the landowner happens to bring such a claim. Nor would it endorse the needless waste of public and private resources that the Ninth Circuit's mechanical approach to ripeness engenders. Yet, the Ninth Circuit has viewed this Court's opinion in *MacDonald, Sommer & Frates v. County Of Yolo, supra*, 477 U.S. at 340, as the springboard for the kind of endless bureaucratic nightmare visited on Santa Fe. Surely this Court did not expect or intend that its holding in *MacDonald* would become an instrument to avoid indefinitely the adjudication of federal constitutional claims or to force landowners to the substantial expense of submitting and resubmitting development applications to an administrative body that cannot provide any meaningful response to such an application. That, however, is the very pattern that this Court's opinion in *MacDonald* has been relied upon to set. The Ninth Circuit's recent pronouncements here and elsewhere, which cannot be reconciled with opinions in other circuits, provide the only evi-

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[6] Two Ninth Circuit cases (one decided after the Ninth Circuit issued its mandate here) arguably adhere to the flexible approach to the ripeness doctrine reflected in the opinions of this Court and of other circuits. While the context in which the ripeness issue was resolved differs markedly from the summary disposition Santa Fe received, these cases seemingly would permit a landowner to proceed without the necessity of one more application and request for variance when the local agency has given the landowner "the final message . . . [and] the end of the road [has been] reached. . . ." *Hoehne v. County Of San Benito*, ___ F.2d ___, 1989 WL 21534 at p. 7 (9th Cir., March 15, 1989). *See also, Herrington v. County Of Sonoma*, 834 F.2d 1448 (9th Cir. 1987), amended by, 857 F.2d 867 (9th Cir. 1988).

dence needed to show that this unconscionable pattern of unfairness will persist unless this Court acts immediately to correct it.

### B. The Ninth Circuit's Mechanical "One More Application" Approach To Ripeness Irrationally Undermines The Fundamental Right Of A Landowner To Obtain Compensation For The Taking Of Its Property

#### 1. In Order To Ensure That The Resolution Of Legitimate Claims Will Not Be Needlessly Avoided Or Postponed, This Court And Other Federal Courts Have Adopted A Flexible Approach For Determining Ripeness And This Case Indisputably Presents A Ripe Controversy Under That Flexible Approach

The purpose of the ripeness doctrine is to prevent the courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967); *see also, Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190, 200 (1983). There is no mathematical formula for determining when a dispute "ripens" from the abstract into the concrete. Rather, that inquiry is a pragmatic one that turns on the facts of each case. *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 148-149. As this Court noted in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941):

> [T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

This Court has never exempted Just Compensation Clause cases from this flexible and rational approach. On the contrary, as this Court pointed out in *MacDonald, Sommer & Frates v. County of Yolo, supra*, 477 U.S. at 348: "[t]o this day [the court has] 'no set formula where regulation ends and taking begins.' " (Quoting

*Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).)[7] Instead, for purposes of evaluating the ripeness of such a taking dispute, the information that this Court "insisted on knowing [was] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 351.

This Court likewise did not place any mechanical restrictions on how a court might answer the question of whether a final and authoritative limitation on development had been established, and with good reason. There are a wide variety of ways a court can satisfy itself that such a final determination had been made. On the facts before it in *MacDonald*, that determination could not be made until a development application was filed. But this Court did not suggest that if the nature and extent of permitted development could be determined *without* a development application, or that if such an application would *not* alter the final and authoritative determination of the type and intensity of the development already determined, that an application nonetheless *had* to be filed. Indeed, the two things that were perfectly clear in *MacDonald* were that the administrative agency could grant appropriate relief, and that if it could not have done so, this Court would not have subjected the landowner to further unfair and meaningless procedures before the agency. 477 U.S. at 348-352 & n.7.

The same was true in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at 172, where the landowner's claim was deemed not ripe because the owner had failed to submit a variance request even though "[i]t appear[ed] that variances could have been granted." *Id.* at 187. That being so, this Court held that "respondent has not yet obtained a final decision regarding how it will be allowed to develop its property" and the claim was not ripe. *Id.* at 190.

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[7] *See also, Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (courts will "examine . . . the 'taking' question by engaging in essentially ad hoc, factual inquiries. . . . "). *Accord, Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

Other circuits have likewise recognized that the actual and realistic availability of administrative relief is a key component of ripeness. Accordingly, once the type and intensity of permitted development has been finally determined, further applications are unnecessary. *See, A.A. Profiles, Inc. v. City Of Fort Lauderdale,* 850 F.2d 1483 (11th Cir. 1988); *Corn v. City Of Lauderdale Lakes,* 816 F.2d 1514 (11th Cir. 1987); *Loveladies Harbor, Inc. v. United States,* 15 Ct. Cl. 381, 386 (Ct. Cl. 1988). *See also, Naegele Outdoor Advertising Inc. v. City Of Durham,* 844 F.2d 172, 174-175 (4th Cir. 1988). *Compare, Unity Ventures v. Lake County,* 841 F.2d 770, 776 (7th Cir.), *cert. denied,* ____ U.S. ____, 102 L.Ed.2d 216 (1988); *Landmark Land Co. Of Oklahoma, Inc. v. Buchanan,* ____ F.2d ____, 1988 W.L. 126469 (10th Cir. 1988); *Littlefield v. City Of Afton,* 785 F.2d 596, 609 (8th Cir. 1986).

For example, in *A.A. Profiles, Inc. v. City Of Fort Lauderdale, supra,* 850 F.2d at 1483, the Eleventh Circuit found a landowners' claim ripe when the city had adopted an ordinance which was designed to rezone the owner's property so as to prohibit development of a wood-chipping operation the city had earlier approved. The court rejected the notion that the landowner needed to do more to obtain review of his claim because "[t]he rezoning ordinance undeniably constituted a final, definitive position." 850 F.2d at 1487 (footnotes omitted). *A.A. Profiles, Inc.* follows the Eleventh Circuit's earlier decision in *Corn v. City Of Lauderdale Lakes, supra,* 816 F.2d at 1514. In *Corn,* the court found that the finality requirement for ripeness was met when the city passed zoning ordinances whose purpose was to place a moratorium on the uses which the landowner had been making of his property. The court concluded that "since the subject ordinances called for a complete moratorium on Corn's development of his property, a request for a variance would plainly have been futile." *Id.* at 1516. The claim was therefore deemed ripe for review.

This case is strikingly similar and equally ripe. The text of Measure Q and its legislative history, together with the binding factual allegations of Santa Fe's complaint, establish that the voter-imposed zoning ordinance governing Santa Fe's property affords it no meaningful procedures and accords the City Council

no flexibility to allow economically viable development. The finality of this ordinance flows not from any considerations involving its subsequent application, but from its immutable and plain terms, as well as from the clear intent of the voters who passed it. Indeed, a further development application by Santa Fe cannot possibly sharpen any issue.

The Waterfront and Specific Plans expressly incorporated into Measure Q by the voters describe in explicit detail the type and intensity of development that will be permitted and the City Council has no power to change that. By express legislative design, as implemented by the City's electorate, only the voters can amend or modify Measure Q and its constituent parts. Thus, Santa Fe has no avenue available to it to seek an administrative application under Measure Q that would allow development to proceed because Measure Q already establishes, in perpetuity, an inflexible development cap. Moreover, Santa Fe is foreclosed from submitting a "meaningful" development plan in the first instance because, as Santa Fe has alleged and should be entitled to prove, the maximum permitted development under Measure Q is so confiscatory as to constitute a taking of Santa Fe's property. As the district court acknowledged, Santa Fe has already filed comprehensive development applications that fully reflect its reasonable expectations and those expectations cannot be realized because of Measure Q's prohibition on such development. (App. A-11)

Where, as here, the operative zoning ordinance represents a confiscatory cap on any proposed development, and no administrative body is empowered to approve any non-confiscatory development plan, "the final and authoritative determination of the type and intensity of development" is known and the case is ripe for adjudication. Under these circumstances, the landowner should not be required to pursue further proceedings before an administrative body in order to present a concrete controversy. Where the maximum permitted development under the controlling zoning ordinance is confiscatory, no application under such an ordinance would be meaningful or, stated differently, any application under such an ordinance would of necessity be futile. The terms of the ordinance itself supply every fact a court needs

to establish an actual case or controversy because the terms provide the definitive position on the legally permitted development.[8]

Since the "definitive position" of the City is known through the voters' passage of Measure Q, which conclusively establishes precisely what development will be permitted, the finality requirement established by this Court in *Williamson* and *MacDonald* is satisfied. Futile applications or reapplications—and this case fits either situation—are not required, and a case like this one is ripe for adjudication under the flexible standard this Court has espoused. *E.g., MacDonald, Sommer & Frates v. County of Yolo, supra*, 477 U.S. at 352-353 n.8; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 192-193; *A.A. Profiles, Inc. v. City Of Ft. Lauderdale, supra*, 850 F.2d at 1486-1487; *Corn v. City Of Lauderdale Lakes, supra*, 816 F.2d at 1516.

**2. The Rigid And Mechanical Ripeness Standard Adhered To In The Ninth Circuit's Cases Invites Bureaucratic Manipulation As A Means Of Defeating A Landowner's Right To Have Its Just Compensation Claims Resolved**

While the Ninth Circuit nominally permits consideration of the merits of a claim if the landowner's application for the administrative relief would be futile, it has taken the position in a line of cases beginning with *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449, that the futility of further applications is not a basis for permitting a landowner's Just Compensation claim to be heard. Yet, in two other cases, the Ninth Circuit seemingly recognized and then applied what amounted to a futility exception, when it was apparent that a final and authoritative determination of the type and intensity of development had, for all practical purposes, been made. This divergence of authority has left landowners in the Ninth Circuit at the mercy of the panel selected to hear their cases and has created confusion in the district courts which, like the district court here, have reluctantly

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[8] Where, on the other hand, relief is possible from the administrative agency, the agency's decision is not final or authoritative, and the claim is not ripe. *See, e.g., Unity Ventures v. Lake County, supra*, 841 F.2d at 776.

felt compelled to follow *Kinzli*'s mechanical approach to the ripeness of land use disputes. (App. 12) *See, e.g., Zilber v. Town Of Moraga*, 692 F. Supp. 1195, 1199 and nn. 3, 4, 5 (N.D.Cal. 1988) (appeal pending).

In *Kinzli*, the Ninth Circuit interpreted this Court's opinion in *MacDonald* mechanically to require both a rejected development plan *and* a rejected application for a variance in *all* circumstances before determining whether a taking claim is ripe. 818 F.2d at 1454. While the court in *Kinzli* purported to recognize the "futility" doctrine in Takings Clause cases, it held that such a futility argument cannot even be raised until the landowner has submitted a development plan and sought a variance. *Id.* Then, in *Lake Nacimiento Ranch v. San Luis Obispo County, supra*, 830 F.2d at 977, the Ninth Circuit again held that the futility exception cannot apply without a rejected development application and a request for a variance. The court stated: "[a]s explained in *Kinzli*, '*at least one* meaningful application for a development project must be made. . . .' In addition, the Ranch must also have made a meaningful application for a variance under the zoning ordinance. . . ." *Id.* at 980.

Finally, in *Shelter Creek Development Corporation v. City of Oxnard, supra*, 838 F.2d at 375, the Ninth Circuit held that the futility exception to the ripeness requirement is simply "unavailable unless and until [the] landowner has submitted at least one 'meaningful application' for development of the property and 'one meaningful application' for a variance." *Id.* at 379 (quoting from *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1454-1455). *Shelter Creek* illustrates the lengths to which the Ninth Circuit appears willing to go in its mechanical reading of the ripeness requirement. In that case the court held that before a landowner could obtain an adjudication of its federal claims, it had to file a request for a special use permit under a county ordinance from whose operation the California Supreme Court had already held the owner was exempted as a matter of state law. 838 F.2d at 380.[9]

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[9] In fact, there are only two Ninth Circuit cases holding a landowner's claim to be ripe, and only one in which the Court of Appeals has held

The opinion in this case is the next logical step in the Ninth Circuit's prevailing illogical application of the ripeness doctrine. Here, the Court of Appeals flatly acknowledged that no matter how certain it may be that the landowner's development and variance requests will be denied, an application for development is necessary to render the claim ripe for adjudication. (App. A-29-A-30) Thus, while Santa Fe had succeeded in showing that Measure Q was sufficiently final and authoritative to satisfy the standard of ripeness articulated by this Court in *MacDonald*, it could not satisfy the mechanical "one more application" standard the Ninth Circuit has transformed *MacDonald* into.

So completely and automatically did the Court of Appeals embrace the notion that a landowner is barred from litigating his claim absent such an application, that it ignored the plain language and the legislative history of Measure Q. It did this by accepting the representation of the City's retained counsel made after the litigation was filed and reiterated with great effect on appeal, that the City Council would interpret Measure Q's terms "flexibly."[10] However, since the intent of Measure Q is to divest

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that the landowner should be allowed to survive a summary adjudication in order to prove allegations of futility. *Hoehne v. County Of San Benito, supra*, 1989 W.L. 21534. In the other case, *Herrington v. County Of Sonoma, supra*, 857 F.2d at 567, there had been no pretrial motion to dismiss for lack of ripeness and the Court of Appeals merely held that the authoritative testimony from responsible county officials adduced at trial demonstrated that further applications from the landowner would in fact have been futile. *Id.*, at 569. Neither *Herrington* nor *Hoehne* automatically insists on a further development application and request for variance, even in the face of newly enacted ordinances. Rather, these cases look to whether "the end of the road [has been] reached." *Hoehne v. County Of San Benito, supra*, 1989 W.L. at 21534 at p. 7. *See also, Herrington v. County Of Sonoma*, 857 F.2d at 569. The prevailing *Kinzli-Lake Nacimiento-Shelter Creek* line of authority, on the other hand, erects seemingly mindless roadblocks to judicial review for landowners by mechanically requiring the filing of "one more application," regardless of the futility of doing so.

[10] To be more precise, the Court of Appeals "rel[ied] on Berkeley's claim, both in its briefs and at oral argument, that section 5 [of Measure Q] gives city planners discretion to apply Measure Q's terms

the Council of any authority to alter the scope and intensity of development authorized by the ordinance, this post-litigation representation should have been accorded no weight.[11]

Thus, instead of adhering to the pragmatic path followed by this and other courts, the Ninth Circuit has adopted a ripeness standard that has yielded inconsistent and often indefensible results and that has made the adjudication of landowner's Just Compensation claims more like traversing a mine field than

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flexibly." (App. A-30, n.3) But, as the City's attorneys conceded in the district court, Section 5 is nothing more than a boilerplate savings clause which was intended as a direction to a *court* which may be called upon to interpret the Measure. It does not directly or indirectly purport to vest the City Council with discretion to vary the terms of Measure Q. The voters, by design, took that discretion away. *See*, n.11 *infra*.

[11] The voters were told that by enacting Measure Q they "locked the City in" to the development permitted in it and that no other development could be permitted unless they said so. (App. A-53) That being so, neither the City's attorney nor the City Council is empowered to undermine what the voters accomplished. Instead, the plain language and the intent of the ordinance must be followed. *Chevron U.S.A. v. National Resources Defense Council, Inc.* 467 U.S. 837, 842- 843 n.9. (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, however, at both the trial and appellate levels, the courts accepted the City's attorneys' post-litigation representation that the City Council could alter the terms of Measure Q in some unspecified manner if Santa Fe would only submit one more application. Yet, no evidence was ever supplied showing how the City Council perceives Measure Q, even assuming the views of the City Council were dispositive of the meaning of an ordinance passed by the voters and not by the Council. Moreover, an unsupported post-litigation representation of counsel is not an authoritative construction of an ordinance. *Securities Ind. Assn. v. Fed. Reserve Bd.*, 468 U.S. 137, 143-144 (1984); *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971). By accepting this maneuver in the present case the Court of Appeals abdicated its own independent responsibility to interpret the meaning of the Measure by discerning the voters' intent. The Court of Appeals—not the City Council or its attorneys—was the final arbiter of the issue that makes this case ripe for review. *E.g., Fagner v. Heckler*, 779 F.2d 541, 543 (9th Cir. 1985); *Cruz v. Zapata Ocean Resources, Inc.*, 695 F.2d 428, 431 (9th Cir. 1982).

pursuing a lawsuit. In doing so, the Ninth Circuit has created a standard in its dominant line of cases which can never be satisfied. By mechanically insisting on an application and a request for variance—or here one more application and a request for variance—when such action cannot possibly affect the maximum level of permitted development, the Ninth Circuit is obviously misconstruing and then misapplying the Court's reasoning in *MacDonald*. *See*, pp. 15-19, *supra*. As the district judge observed in *Zilber v. Town Of Moraga*, *supra*, 692 F.Supp. at 1195, n.5:

> This [Ninth Circuit] rule seems to be a departure from the ripeness principle enunciated by the Supreme Court. The teaching of *Williamson* and *MacDonald* was that courts should not speculate about whether a city will apply a zoning statute to preclude all beneficial use. Consequently, the property owner must pursue any procedures by which he may develop available beneficial use of the property before challenging application of the statute. However, implicit in this rule is the premise that the staute leaves some beneficial use to the property owner. If it does not, then submission of a development application to obtain approval for a beneficial use would be pointless and therefore no speculation about the outcome of the application would be necessary. But this premise, applied by the district court in *Kinzli*, is precisely the one rejected by the Ninth Circuit. *See also*, *id.* at 1195 nn.3, 4 (labeling the *Kinzli* analysis as somewhat "oxymoronic").

In fact, the Ninth Circuit's rigid application of a requirement that there be one more application after enactment of the ordinance encourages courts to accept the kinds of desperate, eleventh-hour maneuvers which litter the history of this case and similarly encourages governmental entities to reach into their bottomless bag of bureaucratic "requirements" at the last minute.[12] If the imagination of bureaucrats is the only limit to prevent

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[12] In this case, for example, the City was uncovering new bureaucratic obstacles even at the petition for rehearing stage. There, for the first time in the litigation, it introduced a supposed development application that Santa Fe could allegedly pursue under Measure Q before the City

adjudication of a landowner's rights, those rights will never be adjudicated on their merits. As the district court expressly recognized, the frustrating process awaiting a landowner can go on "as in many other cases that we have, for years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and [they] can never get into court." (App. A-12) Despite its obvious sympathy with Santa Fe's position, the district court felt bound by the Ninth Circuit's reading of the ripeness doctrine to require the submission of another development request no matter how futile that request may be. As the district court diplomatically put it: " . . . the Ninth Circuit has a higher . . . frustration . . . quotient than some of us would tolerate." (*Id.*)

Given the timing and language of Measure Q, and the unyielding administrative process that preceded it, Santa Fe at a minimum should have been allowed to prove its allegations—which had to be accepted as true for purposes of a motion to dismiss under Rule 12 [*Scheuer v. Rhodes, supra,* 416 U.S. at 236]—that it was the victim of bureaucratic and legislative subterfuges, thrown up in bad faith, to deny just compensation for the taking of its property. To hold otherwise defeats the owner's constitutional right to just compensation and advances no legitimate purpose the ripeness doctrine is intended to serve. As the Court of Claims recently explained in *Loveladies Harbor, Inc. v. United States, supra,* 15 Ct. Cl. at 381: "Plaintiffs should not be forced to submit to piecemeal litigation nor some endless series of requirements. . . . The requirements of ripeness in the area of Fifth Amendment takings also cannot be so extended as to become

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Council. The document was unauthenticated and uncertified. No explanation was provided as to who promulgated it or under what authority. No evidence was submitted to show that it enjoyed the approval of the City Council or, more importantly on this record, the Berkeley electorate. The City nevertheless insisted that this after-the-fact invention rendered the dispute unripe and left the court powerless to act. Just such a scenario was portrayed by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 655 n.22 (1981), where he quoted the following advice from one city attorney to others on how to avoid a landowner's assertion of the Just Compensation clause: " 'If all else fails, merely amend the regulation and start over.' "

more exhaustive than the substantive issues presented by the takings claim itself." *Id.* at 386.

This Court's recent cases hold out the promise that the Just Compensation Clause is not a dead letter and that the rights of landowners, like those of other citizens, will be protected. *See, e.g., First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Commission,* ____ U.S. ____, 97 L.Ed.2d 677 (1987). The Ninth Circuit ripeness standard in land use cases not only fails to give meaning to that promise, it actually undermines it. By forcing landowners in the circuit into an endless bureaucratic morass where their rights are not resolved, a fair resolution of Just Compensation claims is avoided indefinitely. That result is intolerable and cannot be the legacy this Court intended its *MacDonald* opinion to leave behind. As this case and other Ninth Circuit cases demonstrate, the time to redress the Ninth Circuit's misconstruction of *MacDonald* is at hand and the facts of the present case provide the appropriate vehicle for the Court to do so.

## VI

## CONCLUSION

Santa Fe has expended millions of dollars over a period of nearly 20 years in unsuccessful efforts to get some reasonable development approved for its property. It has been rebuffed at every turn by the maneuverings of the City. The Ninth Circuit, through its inflexible and mechanical interpretation of the ripeness doctrine, has now condemned Santa Fe to spend more substantial amounts of money and several more years in a procedural quagmire only to prove what the record here already shows—further administrative proceedings are useless because Measure Q is not administratively amendable or modifiable in any fashion that will permit any meaningful economic development.

The flexible rationale of the ripeness doctrine is not served by refusing to hear a taking claim either where the agency has already made a final decision or where it has no discretion to grant a reasonable development application (*e.g.*, through a variance or other appropriate mechanism), under the operative zoning ordi-

nance. A landowner is not obligated to submit to "unfair procedures," and where the preconditions that give rise to the ripeness requirement are not present, the doctrine ought not to be blindly invoked. The Ninth Circuit's mechanical reading of the ripeness doctrine requiring one more application for development and one more request for a variance in all cases is wrong and in conflict with this Court's opinions and those of other circuits. In order to check the mischief and unfairness the Ninth Circuit's standard has engendered, this petition for certiorari shoud be granted to clarify the law of ripeness as applied in land use cases.

DATED: March 24, 1989.

Respectfully submitted,

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88-No. 1591

# In the Supreme Court

OF THE

# United States

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
*Petitioner,*

vs.

CITY OF BERKELEY,
a Municipal Corporation,
*Respondent.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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United States District Court

Northern District of California

Before: The Honorable Marilyn Hall Patel, Judge

No. C 87-0804 MHP

Santa Fe Land Improvement Company,
A California Corporation,
Plaintiffs,

vs.

City of Berkeley, A Municipal Corporation,
Defendant.

San Francisco, California

Monday, August 3, 1987 11:38 A.M.

The Clerk: Civil 87-0804, Santa Fe Land Improvement Company versus City of Berkeley, et al.

Mr. Mulcare: Good morning, your honor. Ron Mulcare for plaintiff Santa Fe.

The Court: And you are the attorney who is going to be heard on the motion?

Mr. Mulcare: Yes, that's correct, your honor.

The Court: Thank you.

Mr. Weinberger: Mark Weinberger for the City of Berkeley.

With me are Fran Layton and Clement Shute.

The Court: And you're going to be heard on the motion?

Mr. Weinberger: Yes, your honor.

Mr. Mulcare: The accompanying plaintiff's counsel are Fred Caploe and Ben Salvaty.

Mr. Caploe: Good morning, your honor.

Mr. Salvaty: Good morning, your honor.

The Court: Good morning.

There is no dispute, is there, that since the most recent—well, Measure Q and ordinance, there have been no applications made to the City of Berkeley; is that correct?

Mr. Mulcare: There have been no applications since Measure Q, your honor, that's correct.

We, for various reasons, believe that such is not appropriate and that Q was responsive to our six applications earlier.

The Court: Do you think that might be a little gun-shy after *Kinzli* and not make you go back and go through the motions at least?

Mr. Mulcare: No, I don't believe so.

I believe *Kinzli* is totally different, your honor, and I'll explain why. And I'm aware of the fact that your honor may well know the *Kinzli* case better than I, but that is from the trial standpoint.

The Court: I hope so, painfully so.

Mr. Mulcare: In *Kinzli*, your honor, there were various general zoning impositions made by Santa Cruz upon that property. They allowed for timber harvesting, housing, and a variety of other uses, including agricultural, as I recall, recreational uses.

That zoning was applied to many properties, including the *Kinzli* property. It wasn't just targeted at one property.

In that case, there were no applications made that were of a meaningful nature. The court indicated there was one application made by an option holder which was subsequently withdrawn and never pursued.

In our case, your honor, we believe that we have a totally different situation. We made six applications over a four-and-a-half year period of time, spent some four and a half million dollars pursuing those applications.

Those applications were quite specific. They went to our property, and they were for development of that property. Those applications were rejected by the city. In addition, the city considered some 29 other proposals for the use of our property, solely for our property.

The result of all of this, your honor, the result of our applications, in fact, is Measure Q, which is very, very specific.

I think your honor perhaps was bored in reading all the detail that goes into Q and how it operates, but in any event, I think everything was determined in Q right down to the 690 parking spaces. The only thing not determined is the color of the paint between the spaces.

We believe that—and may I point out that in addition to Q, which imposes the 565,000 square foot limit, which of course would be the intensity of development required under *MacDonald*, as defined, I belive that the uses, or the type development, is defined in Q in that it incorporates the uses of the specific plan. In fact, we gave you Exhibit B, which shows exactly what happens on the property.

I point out to the court that the city rejected proposals by its own consultant to allow development of 575,000 square feet—in other words, only 10,000 square feet more than what was in Q and an earlier proposal by its own consultant of 505,000 square feet.

At this point, your honor, I believe that it would be quite futile to apply for any further applications. And the result we do have is Q, which revolved from our applications.

According to the city's logic, you just keep applying. In other words, you apply. Q comes down—we applied six times. According to the city, when Q comes down, then you apply again.

What will they say after that, apply again? I think there has to be a practical end to this.

The Court: I'd like to hear an answer to that.

What reasonable expectations may there be at this point as to what can possibly happen after Measure Q?

Mr. Weinberger: Your honor, thank you.

Let me march through this a little bit and try to put it in the city's perspective.

The point is that there is a clear distinction between the planning process that the city has gone through since January of

1984 culminating in the actions that it took in November and October of 1986 and the application process that specified in state law and specified in the specific plan itself. There is an application process.

State law requires—this is under the permit streamlining act in the government code—it requires the city to take action within one year maximum after an application has been completed and submitted to the city.

The city has every intention of meeting the one-year deadline in the action, based upon an application as soon as Santa Fe submits it.

The construction of the matter is the city's opportunity to apply the detailed laborious time consuming end—and as both sides will tell you, expensive for both parties—planning process that we have gone through. The application isn't an empty formality that is going to lead to a rubber stamp at the end, and there are several reasons for that.

First of all, the whole structure of the process comtemplating the application, as I say, so that the city has before it the specific development proposal that Santa Fe intends to pursue.

That is, under the applicable zoning, where is it going to place its buildings, site plan—from the standpoint of site plan, what kinds of hotel use does it contemplate?

There's a broad range of hotels that might be built. That is, a particular intensity that—further, there is the question of what retail uses that Santa Fe may wish to bring forward.

There is the question of timing. We don't know today whether Santa Fe is going to come in next week or whether Santa Fe may wait for reasons that are for its own good purposes for five years to bring its application in.

We pointed out in the brief, for example, that there are substantial Caltrans-related freeway and near freeway improvements that have to be made before a major development can go in in that area.

There are certain substantial improvements that are specified to be made by the landowner if the landowner is going to develop the property in advance of the Caltrans making the improvements itself under its own capital program.

The point of all of these is that each of those factors can, to a great degree, affect the economic viability, if you will, to use one of the phrases used by the Supreme Court—the economic viability of Santa Fe's development when it comes in.

The City went through this process for three years, as we've described. It has the difficult job of accommodating both the environmental constraints for a unique piece of property, while at the same time recognizing that it must provide an adequate economic return to the plaintiff, to the landowner.

The City believes, after having put a great deal of time and effort into the process, that it has come up with a development plan which is economically feasible. It stands on its plan, obviously.

It wants to go through the application process and test it. It wants to have Santa Fe come in with its application, and if it's proven wrong, if, despite all of the efforts that the City has gone through, to result in a plan that it believes is—meets both of the constraints that it was under. If it doesn't meet it, hypothetically, the City obviously has to respond at that point.

There's a process that's been set forth. And let me explain it very briefly.

It's the so-called savings clause, Section 5 of the Measure Q. When the City Council placed Measure Q on the ballot—and this was a city council-originated initiative that it placed before the voters—when it put that provision before the voters, it included Section 5.

Section 5 provides that no action of the City shall result in a—in effect in a taking of the land owner's property. The—

The Court: What is the effect of that, however, when that very same measure, as you point out, placed on the ballot by the

city council, provides that it may not be amended or repealed except by vote of the people?

What authority does that give or leeway does that give to the city or to the planning commission to, for example, for any variances or take any action that is not specifically detailed and permitted by the ordinance.

Mr. Weinberger: On advice of counsel to the city, the city understands well, and the city's intention—the city council's intention in putting Measure Q on the ballot is to assure that the end product of the planning process followed by the application process is going to result in an environmentally beneficial and an economically beneficial project from the landowner's standpoint.

So the end product will—remember, we're dealing with a whole series of hypotheticals: An application, an application that is followed by the normal give and take that this court recognized and the Ninth Circuit recognized in *Kinzli*, the negotiation, the give and take, the review of the specific project. That may very well result in a resolution of this entire controversy. It may. And that's the whole purpose of the ripeness doctrine.

But if not, working through this series of hypotheticals, the city is prepared—I can represent to the court—to take the necessary action.

Now, it's not at all clear, for instance, that the city electorate would have to vote necessarily on revisions to the specific plan and the waterfront plan, the general plan.

Let me explain the reason, just briefly. There is no doubt under the state government law that the city council remains free at any time to amend its specific plan or its general plan.

The impediment that's raised here by your honor is the presence of the provision that reads that the city may not amend those provision in the two planning documents without a further vote of the people; however, immediately in the same ordinance is the provision that states that Measure Q may not be enforced in such a way as to effect a taking.

If it is the conclusion—if it is the conclusion—and we seriously doubt it will in light of the economic studies that the city's prepared and the posture that it took, knowing that litigation was likely to ensue, given Santa Fe's posture, we were—the city is prepared, if necessary, to consider whether it may, in effect, amend those provision in the absence of voter approval if the contrary step, the failure to amend them, would result in a taking.

The Court: Let me ask you this: Is there any dispute about the fact that prior to Measure Q, Santa Fe did make six applications or several applications at least?

Maybe there's a dispute as to the number.

Mr. Weinberger: The court's initial question didn't give me an opportunity to respond to Mr. Mulcare's statement at the outset.

A few quick points: Number one, the fact that we're dealing with a single property that, as plaintiff has repeatedly stated in its complaint and papers, that this regulation is targeted solely at Santa Fe is legally, and indeed factually, irrelevant.

The point is this is the remaining piece of undeveloped waterfront property, a unique piece of property. I don't think anyone can dispute that.

The fact that the city prepared a specific plan is exactly what state law contemplates when it comes to major pieces of undeveloped property. You don't take them up piecemeal. You take up an undeveloped piece of property as a whole.

Second, your honor, we did respond in the reply brief to this question of, quote, "applications." First of all, I'm not quite sure where the number six comes from, but I do know this. The responding papers of the plaintiff listed several proposals that it made during the planning process.

These were not applications, your honor. These were tossed into the hopper for consideration along with other proposals received from members of the Berkeley community, people outside the Berkeley community, for potential planning results.

And at least two and possibly three of the, quote, "applications" that Santa Fe made were planning presentations.

Secondly, as to the—we count apparently three applications. Remember, your honor, these applications were put in—these were submitted during the planning process.

In other words, frankly, they were an attempt to pre-empt the planning process by pushing forward Santa Fe's proposal for development of the property while the city was expending substantial time and effort to come up with a workable overall plan for the property.

The Court: Well, they did start, however, did they not, in 1971, with some kind of proposal for construction?

Mr. Weinberger: That resulted in a decade of litigation, yes, your honor.

The Court: Um-hum.

Mr. Weinberger: And I think the proposal in part was by a predecessor to Santa Fe.

But anyway, yes, Santa Fe did come in with a proposal at that time. The planning process was put on hold for over a decade as a result of this litigation. Plain and simply, it was ultimately resolved by the State Supreme Court.

But the point is, your honor, these applications that were tendered. Counsel here this morning tells the court that those applications were, quote, "rejected." He's used that word.

The point is, your honor, as the complaint, if it's read carefully, will indicate, in each case the city declined to accept the application as complete. They were never—

The Court: What is that—

Mr. Weinberger: The city felt that all the necessary documentation was not present in order to process the application.

I should tell the court, then, that they were returned to Santa Fe within the first 30-day period. They were never processed. They were never either approved or rejected. They were not reviewed.

The Court: Well, couldn't the city—you know, this admittedly has gone on with or without litigation since 1971.

Couldn't this city, or any city, essentially, by refusing or failing to process an application and declining to call it a rejection but call it something else, essentially forestall any finality that the courts require in order to have a case that's right for adjudication on these issues?

Mr. Weinberger: These applications that we're discussing, the three applications that were rejected came in right in the midst of a planning process that resulted following the dismissal of the litigation that we've referred to that started in the early 1970s.

So there has been a planning process, and the city is perfectly prepared at this point to live with the plan that is constructed through public input, some input, limited input from Santa Fe, through this entire planning process. As I say, it has a single year to respond to the application.

The fear that Santa Fe may submit an application that the city would wrongfully refuse to process—the city is subject to mandamus. If it should wrongfully refuse to accept an application—as a matter of fact, let me go slightly outside the papers before you to indicate that Santa Fe brought litigation against the city right in the midst of this planning process when the city did decline to accept one of Santa Fe's applications.

That suit was ultimately dismissed. It was never brought to judgment.

Mr. Mulcare: Well, there was a stipulated judgment, your honor.

Mr. Weinberger: Excuse me.

Mr. Mulcare: And stipulated in that judgment that Santa Fe had filed its applications it had exhausted its application process.

And it was further stipulated that the city did not even consider those applications on their merits.

The Court: Well, the point I wanted to get to is after all of these quote, "applications," regardless of the number, why isn't it

just as reasonable to treat Measure Q as essentially an adjudication of those applications rather than as yet another starting point?

Mr. Mulcare: Well, they are the response to the applications, your honor.

The complaint carefully alleges the process—ignoring the 1971 and the subsequent litigation, it ignores the process that started in the spring of 1982, which is alleged in the complaint.

At that time, Santa Fe renewed its efforts to develop its property. It submitted applications in response to the applications. This so-called planning process took place.

I will go on, if I may, your honor.

It seems that counsel's position, at least in its written briefs, is that as of the six appplications alleged in our complaint, they're alleged right there. Four of those were applications for development, and two of them were planning applications. That's what I get out of what their position is.

Further, I would like to continue. As far as the flexibility that counsel now seems to indicate the city council has, is in fact nonexistent. The city, in their briefs, indicate that all applications by Santa Fe must conform with and must implement and be consistent with the specific plan.

The specific plan in turn must contain—shall contain, shall conform, and shall implement Q, and Q, which is an ordinance, which cannot be changed by the city council, leaves absolutely no flexibility as to type or intensity.

To attempt at this point in time to go back and do something with Q is totally illusory.

As the specific plan indicates, any application for development, a master development plan, must be consistent with a specific plan. A specific plan must be consistent with Q.

Further, this very document, page 77, as I recall, states that any application for a variance must be consistent with the master development plan. The earlier portion says the master development plan must be consistent with Q.

The whole process is totally illusory. There is no relief in sight. And the city has taken no steps to grant any type of relief or in any way ameliorate this Q.

The Court: I'd like to hear a response from the city as to what I ask, namely: Why should measure Q be deemed essentially a final adjudication or action by the city on these various proposals or applications?

Mr. Weinberger: One reason to start from, your honor, is the recent circuit decision in the *Kinzli* case.

The Court—

The Court: But the difference here—and let me point out where the difference is and where I want you to direct your answer—is that the measure involved in *Kinzli* was not in response to any application by Kinzli.

And a very detailed and specific formulation, such as you have here, as to a specific piece of property and as to very detailed and explicit provisions as to what would be permitted, indeed, that's what this measure is. It appears to be a response to those applications with very little room for variance.

Mr. Weinberger: First of all, your honor, I think that *Kinzli* is instructive here, the circuit decision.

And the reason for that is that the circuit discusses meaningful applications, and the other cases that construe it make it clear that these are post-planning applications.

I think, your honor, the city would be put in a terrible position if it were told that its—at the outset that its planning process is going to substitute for its adjudicatory permitting process.

The whole process, if one looks at the specific plan, is set up in such a way as to complete a process—the planning process and head on to the detailed consideration of the specific proposal, in which the developers', the plaintiffs', the landowners' proposal can be tested specifically.

The city made a series—I have to tell the court—the city made a series of assumptions concerning economic viability and concerning environmental constraints that do need to be tested. But

to come straight to this court to tell them before an application is filed as the city always contemplated by state law and as a matter of fact is—the landowners require by state law to pursue a planning process once it's completed through the application process.

If it doesn't do so, this court will be right back in the position of speculating as to all of those factors that *Hamilton Bank, MacDonald* and *Kinzli* have instructed the courts not to entertain.

The Court: Okay. Counsel, I'm going to deem the matter submitted. It's now noon, and I will tell you tentatively what I'm going to do.

I think all of these cases I guess raise the issue of at what point does frustration reach futility?

It seems that the Supreme Court and certainly the Ninth Circuit has a higher level of frustration maybe than—quotient than some of us would tolerate.

I think that the main—essentially the instructions from the Ninth Circuit and the Supreme Court are that plaintiff is going to have to go back to the city yet one more time.

But I do think in this litigation and this type of litigation that if cities and counties are not more responsible in their bureaucratic process, that there is going to be a tremendous backlash.

This has gone on, as in many other cases that we have, for years and years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and can never get into court.

And I trust that if the appropriate applications are made and they're not adjudicated or acted upon in good faith, as the city now claims it will do, that mandamus will have to be the resort.

But I think the Ninth Circuit and the Supreme Court have indicated that you're going to have to go back yet one more time and try to make some headway through that process and trust that in fact the city will, through the exception provided for in the statute, or in the ordinance, rather, exercise some degree of

discretion, if need be, in order to permit either use of the property, or finally, recognize that it constitutes taking, one or the other.

But I think one of the problems in all of these cases is that the municipalities have very often, through delay and so forth, avoided having to come to grips with those determinations.

Mr. Mulcare: Your honor, may I briefly—

The Court: That's it, counsel. You've had plenty of paper. In fact, you got in a lot extra, and I don't want that to ever happen again. Somebody did it, and I think it was—

Mr. Weinberger: It was us.

We were well admonished by your clerk, your honor.

The Court: Okay. You got in more than you were supposed to, and don't let it happen again.

Okay. Thank you.

Mr. Weinberger. Thank you.

Mr. Mulcare: Your honor, we do have a status conference.

The Court: You know what's going to happen with this then?

Mr. Mulcare: Yes, your honor.

The Court: It's going to be dismissed very likely, so you don't have to worry about that.

Okay.

Mr. Weinberger: Thank you, your honor.

(Proceedings adjourned at 12:05 p.m.)

United States District Court

Northern District of California

No. C-87-0804 MHP

Santa Fe Land Improvement Co.,
A California corporation,
Plaintiff,

v.

City of Berkeley,
a municipal corporation,
Defendant.

ORDER DISMISSING COMPLAINT

[Filed Aug. 25, 1987]

This action arises out of the City of Berkeley's restrictive zoning of plaintiff's property on the shoreline of San Francisco Bay. Frustrated by municipal regulation of commercial development on the Berkeley waterfront, plaintiff Santa Fe Land Improvement Co. ("Santa Fe") asserts claims for the unconstitutional denial of equal protection and due process, the taking of property without just compensation, and the violation of its civil rights under 42 U.S.C. § 1983. The matter is currently before the court on the city's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. The city contends that plaintiff has not yet obtained a final regulatory determination regarding the development of its property, and thus has failed to present the court with a justiciable controversy. For the reasons set forth below, the court agrees and dismisses the action.

## I. FACTUAL BACKGROUND

As set forth in the complaint, the relevant facts are alleged as follows. Plaintiff Santa Fe owns approximately 125 acres of undeveloped real property adjacent to the shoreline of San Francisco Bay in the City of Berkeley. This property is comprised of areas referred to as the Brickyard, the Meadow, the North Basin Strip, and the South Shoreline. Plaintiff is the only private owner of real estate on the Berkeley waterfront. The adjacent property, owned by the city, has been leased for the construction of a hotel

and convention complex, office buildings, three restaurants, three sailing clubs, a boat repair yard and a 1,000 berth commercial marina.

In 1951, Berkeley zoned plaintiff's property as "unclassified." This classification authorizes all uses not otherwise prohibited by law, provided that a permit is secured for the desired use. The city's Master Plans adopted in 1964 and 1977 both designated the unclassified waterfront property as an area "to be studied," though no studies were subsequently conducted. Plaintiff alleges that the Master Plans, coupled with the zoning ordinance governing the use of plaintiff's property, failed to provide an adequate basis for evaluating any permit application submitted for the property's commercial development during this period.

In 1971 Santa Fe and its predecessors-in-interest proposed construction of a regional shopping center on the Meadow portion of the waterfront property. The city rejected the development proposal. Litigation ensued, which concluded in 1983. As part of the litigation's resolution, Berkeley and Santa Fe began negotiations over the future development of the plaintiff's property. This "cooperative planning process" between plaintiff and the city was supplanted in April 1983 by a "public planning process" involving a series of public workshops. The workshops continued through September 1983, when the city issued its "Phase 1 Waterfront Planning Process Report." The report recommended a negotiated development agreement between Santa Fe and the city.

On November 5, 1983, Santa Fe presented a conceptual plan for the development of its waterfront property at an economic conference sponsored by the city's mayor. Plaintiff alleges that the plan was consistent with the recommendations of the Phase 1 report. Upon learning that Berkeley nonetheless planned to extend the public planning process without further consideration of the plaintiff's conceptual plan, Santa Fe submitted a formal use permit application on December 8, 1983, in accordance with the city's zoning ordinance and the property's existing zoning classification. The application sought municipal approval for 3,000,000 square feet of commercial development. Plaintiff also filed a Master Plan Amendment Proposal to conform the city's existing Master Plan to its development proposal. On January 3, 1984, the

city rejected the permit application on the grounds that it lacked specificity.

On January 17, 1984, Berkeley initiated a Phase 2 Planning Process for the purpose of generating within 21 months a Master Plan Amendment and a Specific Plan for the development of plaintiff's waterfront property. Pursuant to this planning process, the plaintiff agreed to contribute $115,000 for the preparation of the required Environmental Impact Report ("EIR"). This contribution was made on the condition that the EIR analysis consider the full range of development alternatives, including substantially greater density and coverage than had been proposed by Santa Fe in its earlier development application. The city subsequently limited the maximum density and coverage of the EIR analysis to the terms of plaintiff's initial application.

Allegedly in response to this action, the plaintiff formally resubmitted its use permit application on March 20, 1985. The application was again rejected by the city on April 16. On May 1, plaintiff appealed the decision to Berkeley's City Council, and on May 15 submitted two specific development applications for a hotel and office building. The City Council scheduled a hearing on plaintiff's appeal for June 4, 1985, but instead adopted an interim Urgency Ordinance establishing a 45 day moratorium on the issuance of any development permits for the waterfront. The City Council subsequently extended the permit moratorium to December 31, 1985, and then again to July 31, 1986.

On July 25, 1985, the city directed its EIR consultant to recommend 500,000 square feet of total floor area development on plaintiff's 7,500,000 square feet of waterfront property. On September 12, 1985, the EIR consultant presented the city with the "Berkeley Waterfront Plan Preferred Alternative" calling for 705,000 square feet of development. On February 13, 1986, the city publicly adopted a "Revised Preferred Alternative" providing for 565,000 square feet of development and recommending that the central Meadow and Brickyard areas of plaintiff's property be acquired for public recreation and open space uses.

On October 7, 1986, Berkeley culminated its Phase 2 Planning Process with the adoption of the Berkeley Waterfront Plan

Amendment to the Master Plan ("Waterfront Plan") and the Berkeley Waterfront Specific Plan ("Specific Plan"), both of which incorporated the provisions of the Revised Preferred Alternative. The Waterfront Plan states the the "Specific Plan constitutes the City's zoning for the Waterfront . . . ." The Specific Plan enumerates in great detail the density, location, coverage, and specifications of development permissible on plaintiff's property, and establishes a permit application process for such development.

The terms of the Waterfront Plan and the Specific Plan were endorsed by "Berkeley Measure Q," an initiative zoning ordinance passed by the city's voters on November 4, 1986. Measure Q stipulates that its specific terms shall not be amended or repealed except by vote of the people. Measure Q further provides that it shall not be construed to authorize a taking of private property for public use, or to implicate the constitutional rights of any property owner. Upon the adoption of Measure Q, plaintiff Santa Fe filed this action.

## II. DISCUSSION

Defendant's motion to dismiss the complaint on finality grounds presents the court with a single question of law: has the plaintiff obtained from the city a final regulatory determination of the type and intensity of development permissible on its waterfront property? If the plaintiff has not yet obtained such a determination, its claims are not ripe for adjudication and the complaint must be dismissed for lack of subject-matter jurisdiction.[1]

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[1] The finality requirement applies equally to claims for uncompensated takings as well as to related claims for the denial of equal protection, due process, and the deprivation of civil rights under 42 U.S.C. § 1983. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir. 1987); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145-46 (9th Cir. 1986). Plaintiff's entire complaint is thus subject to the jurisdictional prerequisite of a final regulatory determination.

A. Standard for Finality

In a series of recent opinions, the Supreme Court has clarified the finality requirement and suggested the showing necessary to satisfy it. As the Court has made increasingly clear, challenges to land-use regulations are not ripe for adjudication "until the govenment entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 3121 (1985). This requires that the government provide a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, ____ U.S. ____, 106 S. Ct. 2561, 25566 (1986). While the precise contours of a "final and authoritative determination" remain to be defined, recent Supreme Court decisions indicate that prior to bringing suit, finality minimally requires that a plaintiff submit at least one development application to the appropriate regulatory authority, and upon its rejection seek variances permitting uses not authorized under the governing zoning ordinance. *Williamson*, 105 S. Ct. at 3117-18; *MacDonald*, 106 S. Ct. at 2567; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court has also made clear that if the rejected development plan is "exceedingly grandiose," finality requires that the plaintiff subsequently submit a less ambitious development application prior to bringing suit. 106 S. Ct. at 2569 n.9. Nonetheless, a plaintiff "is not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Id.* at 2567 n.7.

B. The Finality of the City's Determination of Permissible Development on Plaintiff's Property

The city argues that plaintiff has failed to satisfy the finality requirement delineated by recent Supreme Court authority insofar as Santa Fe has not submitted a development application pursuant to the procedures set forth in the Specific Plan, nor sought any variance from or modification of an adverse decision rendered under those provisions. *See* Berkeley Waterfront Specific Plan § 7.3 *et seq.* In response, plaintiff offers four arguments in support of the finality of its claims. These include (1) that

finality is appropriately determined by an ad hoc, factual inquiry, and thus that the court presumably need not focus on formalities such as the submission of prior development applications; (2) that Santa Fe has in fact submitted prior development applications satisfying the finality requirement; (3) that the submission of a development application pursuant to the permit procedures of the city's 1986 enactments is not required for finality purposes, since the enactments represent a final adjudicative determination of plaintiff's prior development applications rather than new zoning ordinances; and (4) that the plaintiff's failure to submit a development application pursuant to procedures of the 1986 enactments is excused by the futility exception to the finality requirement.

1. *Ad Hoc Determination of Finality.* Plaintiff first attempts to sidestep the entire line of precedent setting forth the finality requirement by arguing that "the question of whether the type and intensity of development has been determined is a practical one, the answer to which must be based upon the particular facts of the case before the Court." Plaintiff's Opposition Memorandum, at 16. In support of this assertion, plaintiff misleadingly cites language in the *MacDonald* opinion for the proposition that the court's analysis of finality must follow an "ad hoc, factual inquir[y]." 106 S. Ct. at 2566. The inquiry discussed by the Court in *MacDonald,* though, plainly pertains to the determination of whether a regulatory taking has occurred, not the other threshold jurisdictional question of whether the regulatory decision itself is final. The latter issue is the only one before this court, and it is resolved not by a case-specific factual inquiry but by the application of objective criteria identified by Supreme Court precedent.

2. *Submission of Prior Applications.* Among the objective criteria for a "final and authoritative determination" is the prior submission of at least one development application and one variance request to the appropriate municipal authority. Plaintiff argues that it has satisfied this prerequisite by submitting multiple development applications to the city, including its 1983 use permit application and Master Plan Amendment proposal, its 1983 conceptual plan, its 1985 resubmission of the earlier use permit application, and its 1985 specific development applications

for the construction of a hotel and an office building. Each of these rejected applications, though, preceded the 1986 enactments which revised the zoning provisions governing development on the Berkeley waterfront. While the Specific Plan delineates an extensive permit application process at section 7.3, plaintiff has chosen not to avail itself of the enactment's new permit procedures.

The required submission of at least one meaningful development application prior to bringing suit presumes that the preceding application is made pursuant to the current zoning ordinances and procedures; otherwise, there can be nothing final about the challenged regulatory act, since it represents the product of a regime no longer governing the decisions of the planning authority. This was recently made quite clear in a case involving strikingly similar factual circumstances:

> The City argues that plaintiffs have . . . not submitted a development plan under the present land use regulations . . . ; they have not applied for a variance; they have not applied for a zoning change. Plaintiffs counter that they have already received several final rejections of their efforts at Queen's Beach, that they should not be required to beat their heads against a stone wall, and that all further efforts would be futile. The record shows that plaintiffs have been involved in an ongoing attempt to develop Queen's Beach as a resort. The majority of their activity, however, has been attempts to influence the drafting of the East Honolulu Development Plan and amendments thereto. Plaintiffs have made only two specific applications for zone change or development. . . . Plaintiffs have made no attempt to apply for development permits, zoning changes, or variances at Queen's Beach under its present zoning. . . . Plaintiffs have made no meaningful application to determine what uses or combinations of uses might be approved at Queen's Beach. As [Supreme Court precedent] make[s] clear, there is, as yet, simply no "concrete controversy regarding the application of the specific zoning provisions."

(citation omitted) *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 940-42 (D. Haw. 1986). Santa Fe's

rejected development applications made pursuant to the previous zoning ordinance therefore cannot be used for purposes of the finality requirement to excuse the absence of any development application or variance request under the new zoning provisions of the Specific Plan.[2]

3. *1986 Enactments as Final Determinations.* Plaintiff alternatively argues that Measure Q, the Waterfront Plan, and the Specific Plan are not actually zoning enactments, but rather the city's final adjudication of Santa Fe's earlier development applications, disguised as revised zoning laws. Plaintiff thus contends that finality does not require the submission of a development application under the 1986 enactments, since they represent only the conclusion of an ongoing application process rather than a new regulatory regime. In support of this contention, plaintiff cites the specificity with which the 1986 enactments identify the type and intensity of development allowed on Santa Fe's property; the absence of discretion with respect to the implementation of these specified provisions; the fact that the enactments apply only to the plaintiff, as the sole private property owner on the Berkeley waterfront; and the absence of available legislative or administrative relief, since only a vote of the people can amend the provisions endorsed by Measure Q.

Plaintiff's argument significantly misconstrues the express terms of the 1986 enactments. While the enactments do specify allowable development on plaintiff's property with great precision,

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[2] Plaintiff cannot be required to pursue unfair procedures to obtain a final regulatory determination. *MacDonald*, 106 S. Ct. at 2567 n.7. Thus were the city to manipulate the zoning process by enacting a new ordinance each time the plaintiff submitted a new development application, or indefinitely imposed a moratorium on use permit applications, the finality requirement could not be used to shield the city from litigation. Here, though, the city altered the zoning status of plaintiff's property for the first time since 1951, and did so after a three year deliberative process in which the plaintiff and the public played a significant part. It is premature to characterize this as an unfair tactical ploy to avert litigation. Nonetheless, future revisions of the zoning ordinance must be examined with greater scrutiny if the effect will be to deny plaintiff a final, appealable zoning determination.

Measure Q explicitly states that it shall not be construed to effect a taking of private property for public use nor to implicate the constitutional rights of any property owner. To the extent that this provision conflicts with the specified development parameters set forth elsewhere in Measure Q and the Specific Plan, discretion is clearly vested with the planning authority to resolve any inconsistency. Furthermore, section 7.3.11 of the Specific Plan provides for an appeal procedure to the City Council from initial determinations of the Planning Commission, providing yet another level of discretionary review. Thus under the terms of Measure Q, plaintiff could significantly alter the type and intensity of allowable development on its property were it capable of demonstrating to either the Planning Commission or the City Council during the application process that development as specified in the 1986 enactments interfered with its reasonable investment-backed expectations. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). This does not suggest that a final determination has already been made.

More significantly, plaintiff's argument regarding the determinative character of the 1986 enactments requires the court to engage in speculation about the impact of the zoning provisions which is flatly prohibited by the ripeness doctrine itself. Plaintiff asks the court to look past the express terms of the enactments and divine their true intent and impact, absent any action by the planning authority charged with implementing the terms of the zoning regulations. As the Ninth Circuit recently observed, though, there is simply no circumstance where the court can substitute its speculative judgment for the determination of a planning authority presented with an actual development application. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987). Regardless of the specificity of the 1986 enactments and the absence of discretion in their implementation, case authority requires that the city's planning authority nonetheless complete its possibly foreordained task and adjudicate an actual development application before a justiciable controversy exists. As this court recently wrote with respect to another administrative function of the defendant, "[w]hile . . . plaintiffs should not be overly optimistic about the ultimate sufficiency of the City's administrative remedy, they must nonetheless allow Berkeley the opportu-

nity to act upon its word." *Ross v. City of Berkeley*, 655 F. Supp. 820, 841-42 n.21 (N.D. Cal. 1987).

4. *The Futility Exception.* Plaintiff's final argument invokes the futility exception to the finality requirement. Santa Fe asserts that the specificity and lack of discretion characterizing the 1986 enactments demonstrate that any application for a property use not explicitly endorsed by the new zoning provisions would be an "idle and futile act," thus establishing the existence of a ripe controversy despite the absence of a development application. *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9thCir.), *cert. denied*, 464 U.S. 847 (1983); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). Plaintiff urges the court to acknowledge the improbability of the municipal planning authority varying from the enactments' specific terms, and accordingly requests that its failure to sumbit a development application pursuant to the procedures of the 1986 enactments be excused on futility grounds.

Plaintiff's argument ignores the most recent pronouncement of the Ninth Circuit on the futility exception. In *Kinzli v. City of Santa Cruz*, the circuit held unequivocally that the futility exception can be applied only to acts or omissions occurring subsequent to the submission of a development application and a variance request. 818 F.2d at 1455 n.6. Thus as a threshold consideration, "at least one 'meaningful application' must be made" for both a use permit and a variance before a plaintiff can invoke the exception. (citation omitted) *Id.* In light of the preceding analysis, it is clear that Santa Fe's failure to submit a development application after the enactment of Measure Q, the Waterfront Plan, and the Specific Plan bar plaintiff from relying on the futility exception.[3] Nonetheless, the court must remind the city that it cannot use the application process to endlessly thwart litigation; plaintiff has in good faith sought a final regulatory determination for a number of years, and Berkeley must now be

[3] Given this disposition, the court does not reach defendant's argument that the complaint alternatively should be dismissed because of the existence of an adequate state procedure for the remedy of plaintiff's alleged injuries.

prepared to promptly provide it upon receipt of plaintiff's use permit and variance applications under the 1986 enactments. The city's failure to do so most assuredly will not suffice to preclude judicial review.

ACCORDINGLY, plaintiff's claims for the denial of equal protection and due process, the taking of property without just compensation, and the violation of civil rights under 42 U.S.C. § 1983, are not ripe for adjudication, and are dismissed for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

DATE: Aug. 26, 1987

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

United States District Court

Northern District of California

No. C-87-0804 MHP

Santa Fe Land Improvement Co.,
a California corporation,
Plaintiff,

v.

City of Berkeley,
a municipal corporation,
Defendant.

Judgment

[Filed Aug. 26, 1987]

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been presented and an order having been duly filed herein,

IT IS ORDERED and ADJUDGED that this action be and is hereby dismissed.

DATED: Aug. 26, 1987

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

Not for Publication
United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Improvement Company,
a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and submitted June 16, 1988
San Francisco, California

MEMORANDUM*

[Filed Aug. 29, 1988]

Before: GOODWIN, Chief Judge, CHOY and NORRIS, Circuit Judges.

Santa Fe Land Improvement Company appeals the dismissal of its regulatory taking claim brought pursuant to 42 U.S.C. § 1983 (1982). The district court determined that Santa Fe's claim was not ripe for judicial adjudication and dismissed for lack of subject matter jurisdiction. We affirm.

Santa Fe owns approximately 125 acres of undeveloped real property adjacent to the shoreline of San Francisco Bay in the City of Berkeley. Santa Fe is the only private owner of real estate on the Berkeley waterfront. The adjacent property, owned by the city, has been leased for a hotel and convention complex, office

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

buildings, three restaurants, three sailing clubs, a boat repair yard and a 1,000-berth commercial marina.

Since 1971, Berkeley has rejected all development proposals put forward by Santa Fe. Santa Fe formally resubmitted an amended use permit application in 1985. The application was promptly rejected. Santa Fe appealed the decision to the City Council. The City Council scheduled a hearing on Santa Fe's appeal for June 4, 1985, but instead adopted an interim Urgency Ordinance establishing a 45-day moratorium on the issuance of any development permits for the waterfront. The City Council subsequently extended the permit moratorium to December 31, 1985, and then again to July 31, 1986.

On July 25, 1985, Berkeley directed its EIR consultant to recommend 500,000 square feet of total floor area development on plaintiff's 7,500,000 square feet of waterfront property. On September 13, 1985, the EIR consultant presented Berkeley with the "Berkeley Waterfront Plan Preferred Alternative" calling for 705,000 square feet of development. On February 12, 1986, Berkeley publicly adopted a "Revised Preferred Alternative" poroviding for 565,000 square feet of development and recommending that the central Meadow and Brickyard areas of Santa Fe's property be acquired for public recreation and open space uses.

On October 7, 1986, Berkeley culminated its Phase 2 Planning Process with the adoption of the Berkeley Waterfront Plan Amendment to the Master Plan (Waterfront Plan) and the Berkeley Waterfront Specific Plan (Specific Plan), both of which incorporated the provisions of the Revised Preferred Alternative. The Waterfront Plan states that the "Specific Plan constitutes the City's zoning for the Waterfront. . . ." The Specific Plan enumerates in great detail the density, location, coverage, and specifications of development permissible on Santa Fe's property, and establishes a permit application process for such development.

The terms of the Waterfront Plan and the Specific Plan were endorsed by "Berkeley Measure Q," an initiative zoning ordinance passed by the city's voters on November 4, 1986. Measure Q stipulates that its specific terms shall not be amended or

repealed except by vote of the people. Measure Q further provides that it shall not be construed to authorize a taking of private property for public use, or to implicate the constitutional rights of any property owner.

Santa Fe contends that Measure Q constitutes the final and immutable determination of the type and intensity of development legally permitted on its waterfront property and that, given the final and immutable nature of Measure Q, no recognized principle of ripeness bars Santa Fe from going forward with litigation. Santa Fe's claim that Measure Q effected a taking as applied to its property does not, however, present a concrete controversy ripe for adjudication. Santa Fe must first submit a development plan or apply for a land use permit. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).

Santa Fe, to initiate its regulatory taking claim, must first establish (1) that after Measure Q was adopted, a specific development plan was rejected, (2) that the rejection constituted a taking of its property, and (3) that any compensation tendered is unjust. *MacDonald*, 477 U.S. at 348; *Kinzli*, 818 F.2d at 1453.

In establishing the first element of its regulatory taking claim, Santa Fe must demonstrate that "a final and authoritative determination of the type and intensity of development legally permitted on the subject property [has been rendered]." *MacDonald*, 477 U.S. at 348. Without satisfaction of this prerequisite, it would be impossible to begin assessing whether Measure Q goes too far:

> [T]he difficult problem [is] how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in significant part, upon an analysis of the effect . . . of the . . . regulation[] had on the value of [the] property and investment-backed profit expectation. That effect cannot be measured until a final

> decision is made as to how the regulation[ ] will be applied to [the] property.

*Williamson*, 473 U.S. at 199-200 (footnote omitted). Similarly, we cannot determine whether Berkeley has failed to provide just compensation until we know what, if any, compensation the responsible city administrative body intends to provide. *See id.* at 195.

To surmount the final decision bar, Santa Fe's taking claim must reflect an already rejected development plan and a denial of a variance. *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987); *Kinzli*, 818 F.2d at 1454. At the heart of this requirement is a showing of "concrete harm" upon Santa Fe as a landowner.

Santa Fe says it has not attempted to secure either a rejected plan or a variance denial following the enactment of Measure Q because to do so would be futile. Futility may be true, as a practical matter, but Santa Fe must go through the formal procedure before the action will lie. The final decision bar applies.

The Supreme Court in *MacDonald* has indicated that at least one meaningful application[1] must be submitted before the futility exception applies.[2] 477 U.S. at 352-53 n.8; *American Savings & Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (submission of a development application would not be futile where landowner had failed to submit a meaningful application). Because Santa Fe has failed to submit a meaningful application under the new ordinance, the futility exception does

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[1] Meaningful as used here "does not include a request for 'exceedingly grandiose development.' " *Kinzli*, 818 F.2d at 1455 (quoting *MacDonald*, 477 U.S. at 353 n.9).

[2] We have also recognized in this circuit that landowners, in addition to the meaningful application requirement, bear a heavy onus in showing futility. *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 876 (9th Cir. 1987); *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

not apply to circumvent the final decision bar to its taking claim.[3] *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d at 872-77 (9th Cir. 1987), *petition for cert. filed*, June 22, 1988; *Kinzli*, 818 F.2d at 1455 n.6. Consequently, we need not address the remaining questions that can be presented after ripeness is satisfied. The district court correctly determined that Santa Fe's regulatory taking claim was not ripe for consideration.

AFFIRMED.

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[3] In reaching this conclusion, we rely on Berkeley's claim, both in its briefs and at oral argument, that section 5 gives city planners discretion to apply Measure Q's terms flexibly.

Not For Publication

United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Improvement Company, a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellee.

ORDER
[Filed Nov. 4, 1988]

Before: GOODWIN, Chief Judge

Appellees shall file a response to Appellant's Petition for Rehearing within twenty-one (21) days.

United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Imporovement Company, a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellant.

ORDER
[Filed Jan. 3, 1989]

Before: GOODWIN, Chief Judge, CHOY and NORRIS, Circuit Judges.

Appellants' petition for rehearing is denied.

County of Alameda

Sample Ballot
& Voter Information Pamphlet
General Election
Tuesday, November 4, 1986
THE LOCATION OF YOUR
POLLING PLACE
IS SHOWN ON BACK COVER

Polls Open at 7 A.M. and Close at 8 P.M.

NOTICE: Absent Voter Ballot Application Enclosed

Muestra de Balota
y Panfleto de Información para el Elector
Elección General
Martes, 4 de Noviembre de 1986
EL LUGAR DONDE DEBE
USTED VOTAR
APARECE EN LA CUBIERTA POSTERIOR

Las Elecciones Empiezan a las 7 A.M. y terminan a las 8 P.M.

AVISO: Applicacion de Balota Ausente Incluido

City of Berkeley Initiative Ordinance

P MEASURE P: Shall an ordinance be adopted limiting development on the waterfront to the area known as the north basin strip (North of Virginia St.) and designating as open space the beach, brickyard and meadow; and shall the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to conform?

Financial Implication: Administrative costs; amount unknown. Yes ☐ No ☐

Full Text of Measure P

BE IT ORDAINED by the people of the City of Berkeley as follows:

Section 1. Purposes.

(a) To protect and promote the public health, safety, and welfare by designating certain areas of the Berkeley waterfront; the Berkeley Beach, the Brickyard, and the Meadow for preservation as open space.

(b) To require that the Master Plan and Zoning Ordinance of the City of Berkeley, and the Berkeley Waterfront Specific Plan be revised within six (6) months of the effective date of this ordinance.

Section 2. Findings.

It is hereby found and determined as follows:

(a) It is in the best interests of the residents of the City of Berkeley to preserve and protect the open space, views, wetlands, wetland-type environment, bay front meadows, marshes, wild life habitats, beaches, creek mouths, and the unique and irreplaceable waterfront area of the City, being all that land in the City of Berkeley generally adjacent to San Francisco Bay and west of U.S. Interstate 80 (I-80).

(b) The portion of the waterfront area west of I-80, south of Virginia Street (including the City's Virginia Street easement), and east of the Berkeley Marina constitutes environmentally sensitive, irreplaceable, and unique contiguous waterfront open space, wetlands, marshes, wetland type environment, plant and wildlife habitat, and bay front meadow; and it is in the public interest to preserve, protect, and restore all said portion of the waterfront area in a natural, open and undeveloped form.

(c) Unless those areas of the Berkeley waterfront south of Virginia Street and east of the Berkeley Marina are preserved as open space the following adverse effects are likely to occur:

(1) Traffic. Traffic congestion in and around the waterfront, already unacceptable, will increase.

(2) Wetlands and habitats. Important wetlands and habitats will be lost, resulting in the loss of waterfront plant life and wildlife, including migratory birds, and a further diminishing of the health of San Francisco Bay. The wetlands resolutions adopted by the Berkeley City Council on February 13, 1986 are hereby incorporated into this ordinance by reference.

(3) Open Space. The City of Berkeley would lose a unique contiguous open space area. Irreplaceable scenic beauty would also be lost.

(4) Pollution. There would be an increase in air, noise, and water pollution.

(5) Seismic safety. Because of the geology of the land and its proximity to major earthquake faults, development would result in a threat to life and property in the event of an earthquake.

(d) Title 7, Article 10.5 of the California Government Code, "Open Space Lands," hereby incorporated into this ordinance by reference, mandates that cities make and carry out plans "for the preservation of valuable open-space land."

Section 3. Policies.

(a) Those areas of the Berkeley waterfront west of I-80, south of Virginia Street and the North Basin (including the City's Virginia Street easement), and east of the Berkeley Marina (commonly known as the Berkeley Beach, the Brickyard, and the Meadow, including the East Meadow) shall remain in open space in perpetuity. Except as specified in this ordinance, no development shall be permitted in these areas. The Berkeley Beach is the seven (7) or more acres of shoreline west of I-80 and extending from the Emeryville city limits to the Brickyard. The Brickyard is the approximately 29 acres of land west of I-80, and south of University Avenue. The Meadow is the approximately 72 acres of land west of I-80, north of University Avenue (and including the strip of land immediately south of University Avenue), south of Virginia Street and the North Basin (and including the City's Virginia Street easement), and east of the Berkeley Marina. A nature interpretive center no more than one (1) story, not to

exceed a height of 20 feet and containing no more than 5,000 gross square feet of floor space shall be permitted on the Brickyard subject to a use permit. An appropriate number of public restroom facilities shall be permitted on the Meadow, Brickyard, and Berkeley Beach.

(b) Development shall be permitted on those areas of the waterfront not covered by Section 3.(a) of this ordinance, subject to policies contained in the Berkeley Master Plan, Berkeley Zoning Ordinance, Berkeley Waterfront Specific Plan, and any other relevant policies that may be adopted by the Berkeley City Council and any policies that may be adopted by the citizens of Berkeley in an initiative ordinance.

Section 4. Programs and Time Limits.

Within six (6) months of the effective date of this ordinance, the City of Berkeley's Master Plan, Zoning Ordinance and Waterfront Specific Plan shall be amended to incorporate the policies contained in this ordinance. However, the policies contained in this ordinance shall be in force as soon as the ordinance takes effect.

Section 5. Constitutionality.

This ordinance is not intended, and shall not be construed as authorizing the City of Berkeley to exercise its power in a manner which will take or damage private property for public use. This ordinance is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Section 6. Severability.

If any portion of this ordinance is hereafter determined to be invalid, all remaining portions of this ordinance shall remain in full force and effect, and to this extent the provisions of this ordinance are separable.

Section 7. Amendment.

No part of this ordinance shall be amended or repealed, except by a vote of the people.

Section 8. Effective date.

This ordinance shall take effect immediately upon its passage by the voters of the City of Berkeley.

Berkeley City Attorney Analysis of Measure P

The proposed ordinance, if adopted, would regulate development on certain areas of the Berkeley waterfront currently owned by Santa Fe Land Improvement Company in the following manner.

1. Prohibit any development, other than public restrooms and a nature interpretative center of no more than one 20 foot story, containing no more than 5000 square feet, on certain areas of the Berkeley Waterfront, currently owned by Santa Fe Land Imporovement Company, located west of I-80, south of Virginia Street and the North Basin (including the City's Virginia Street Easement) and east of the Berkeley Marina. The areas in which such development is prohibited are commonly known as the Meadow (72 acres of land west of I-80 and north of University Avenue, including a strip south of University Avenue), the Brickyard (approximately 29 acres of land west of I-80 and south of University Avenue) and the Berkeley Beach (7 acres of shoreline west of I-80 extending from Emeryville to the Brickyard).

2. Require that the Meadow, Brickyard and Berkeley Beach remain in open space in perpetuity, but authorize development on the remaining Santa Fe land at the waterfront located in the North Basin, north of Virginia Street.

3. Require, within six months of passage of the ordinance, that the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to incorporate the policies contained in the ordinance. Under the City Plan in effect on August 1, 1986, the waterfront is designated as "unclassified" and, thus, any development may be approved upon a finding of no detriment by the Board of Adjustments or the City Council on an appeal. As of August, 1986, the date this analysis was prepared, the City is completing a three year planning process in which it has tenta-

tively approved a plan for the waterfront and is in the process of receiving public comments on the Environmental Impact Report which the City commissioned regarding the proposed plan. This ordinance differs from the current proposed plan in three respects: Firstly, the current proposed plan calls for public acquisition of the Brickyard, the Berkeley Beach and 50 acres of the Meadow, whereas this ordinance requires that these areas, including the entire 72 acre Meadow remain as open space in perpetuity, irrespective of whether the City actually buys the land from Santa Fe. Secondly, the current proposed plan would permit development of a hotel and conference center in the East Meadow, if Santa Fe's lease with the racetrack at Golden Gate Fields precludes development in the North Basin until 1997, whereas this ordinance would prohibit all development in the East Meadow whether or not Santa Fe's lease precludes it from development in the North Basin. Thirdly, the current proposed plan calls for public acquisition of the East Meadow if the lease does not preclude development in the North Basin, whereas this ordinance requires that the East Meadow remain open space in perpetuity, irrespective of whether the City does not actually buy the land. Public acquisition of any of the land required to remain open space would be permissible.

This ordinance differs from the other measure regarding the waterfront in two major respects:

(a) This measure prohibits construction of any structure in any portion of the meadow, whereas the other measure would permit development on no more than twelve acres of the 72 acre Meadow if development in the North Basin strip is legally and financially infeasible because of a lease existing as of January 1, 1986, between Santa Fe and Pacific Racing Association.

(b) This initiative ordinance specifies that development on the North Basin Strip shall be based on the City's planning process which as of August 8, 1986, fixes development at 565,000 sq. ft. However it does not attempt to bar the City Council from making changes in the development to be allowed on the North Basin Strip at a later date.

If both measures pass, the one which receives the most votes will supersede any conflicting provision of the other.

Financial Implications

Additional administrative costs to revise the City's plans and zoning ordinance in an amount unknown at this time.

## Argument in Favor of Measure P

Measure 'P', the citizens' initiative, will save our waterfront from massive development. Because Berkeley residents are so concerned about the preservation of their magnificent open space bayfront, in just eight days over 3,600 of them signed a petition to put Measure 'P' on the ballot.

Measure 'P' protects the waterfront "Meadow" (the open field between the Marina and Interstate 80), the Brickyard (the peninsula just south of University Avenue), and the Berkeley Beach. These are the most ecologically sensitive areas of our waterfront. The Environmental Impact Report on the waterfront indentifies 17 acres of seasonal ponds on the Meadow as a migratory bird habitat. Numerous species of waterbirds, including the endangered brown pelican and the California least tern, frequent the site.

The greatest concentration of these ponds is on the Meadow's east end, exactly where the pro-development Measure 'Q' on this ballot would build a huge hotel twice the size of the Golden Bear complex at University and Milvia. These ponds would be destroyed and a critical migratory bird habitat would be lost forever. This hotel would also have disastrous traffic and pollution impacts throughout the waterfront and in West Berkeley. The hotel would also make the remaining open space less accessible to local residents. And it would threaten Bay water quality.

Measure 'P' respects the property owner's rights by allowing some development north of Virginia Street. However, any development would have to be compatible with the environment.

Every year the Bay Area becomes more densely developed and open space harder to find. It is therefore crucial that we preserve as much of our waterfront as possible so that we and future

generations will be able to enjoy the bayfront's unparalleled views and its calming and restorative qualities.

Save our irreplaceable waterfront. Vote YES on 'P'. Vote NO on 'Q'.

s/City Councilmember John Denton, Chair Council Waterfront Committee

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund

s/Gerda Miller, Convenor Berkeley Gray Panthers

s/Irv Rautenberg, Director Bayfront Conservancy Fund

s/Erna P. Harris

Rebuttal to Argument in Favor of Measure P

"Measure P won't protect the waterfront from massive development—not the Meadow, not Berkeley Beach, not the Brickyard, not the seasonal ponds, not the migratory birds—if it's thrown out of court."

—Norman La Force, Director, Berkeley Bayfront Conservancy Fund

The authors of Measure P are our friends. We share the same goals and vision for the waterfront. But experienced environmental attorneys have repeatedly issued the same warning: the legally sloppy approach of Measure P may not stand up in court.

Measure P makes two other major mistakes:

• If fails to place height and square-footage limits on buildings located north of the Meadow. Possible result: massive highrises along I-80.

• It fails to restrict development on the East Meadow to the minimum, should the city be legally required to allow it. Possible result: massive development on the Meadow.

It's for these reasons that the Sierra Club waterfront taskforce drafted Measure Q. It plugs gaps. It corrects errors. It provides backup protections. It gives Berkeley's lawyers the strongest

possible legal basis for defending its environmentally sound waterfront plan against Santa Fe.

In the best of all possible worlds, Santa Fe would join with the city in protecting the environment, and Measure P would be adequate. In the real world, where Santa Fe wants only to maximize its profits, the waterfront needs strong, legally tight protection.

Measure P doesn't do the job. Measure Q, written by the Sierra Club waterfront taskforce, does.

PLEASE VOTE NO ON P AND YES ON Q.

s/Maudelle Shirek, City Councilmember

s/Helen King Burke, Director, EBMUD

s/Luis Reyna, Vice-Chair, Waterfront Commission

s/Curt Manning, West Berkeley Project Area Committee

s/Steve Bedrick, Land Use and Environmental Attorney

## Argument Against Measure P

### Danger: Low Protection

Though well-intentioned, this initiative is dangerous to the City. It does not offer the City sufficient legal protection in a lawsuit by the landowner, Santa Fe. This greedy company, the biggest private landowner in the State of California, has continually tried to bully the City with lawsuits. We must be prepared for more. We cannot afford to weaken the City's legal defense by voting for this initiative.

### Danger: No Planning

What's wrong with it? The initiative does not draw upon the reports and studies produced during the three year planning process that supports the City's case for low-density development and environmental protection.

Danger: High Density

This initiative does not restrict development on the North Basin Strip, the stretch of land along I-80 where tall buildings could block our beautiful bay views. Citizens have worked for three years to insure height and density limits on the Waterfront. This measure removes those protections.

Save the Waterfront

Fortunately, you have a better choice—the Waterfront Conservation and Planning Act sponsored by the Sierra Club. This alternative measure is designed to stop Santa Fe's legal abuses and to protect our Bayfront environment with its irreplaceable shoreline open space.

Protect the Waterfront

Vote No on Measure Q and Yes on Measure P

s/Jim Liljenwall, Chair, Waterfront Commission
s/Curt Manning, West Berkeley Project Area Committee
s/Ramsey Miller, Planning Commission
s/David Taylor, Chair, Board of Adjustments

Rebuttal to Argument Against Measure P

Measure P, the Citizens' Initiative, is the only ballot measure that preserves the entire Berkeley waterfront Meadow as open space. The Meadow is the most ecologically fragile area of the waterfront. The counter waterfront measure on the ballot, Measure Q, allows a massive hotel and convention center to be built on the Meadow, destroying wetlands and a migratory bird habitat.

Measure P is legally sound. The allegations made by the opponents of Measure P are unsubstantiated. Measure P protects waterfront open space while respecting the landowner's rights.

Measure P respects the planning process. It fulfills the community's desire to preserve the Meadow, Brickyard, and Beach and allows the community to determine how much development will be allowed on the waterfront's North Basin Strip. Measure Q,

however, abuses the planning process by permitting 565,000 square feet of development (equal in size to the Transamerica Pyramid) to be built on the Meadow and North Basin Strip, even though this is far more development than the community wants. The waterfront Environmental Impact Report says that this level of development would have disastrous environmental and traffic impacts.

Save Our Bayfront

As the San Francisco Bay Area continues to grow outward in every direction, open space becomes ever more difficult to find. To protect our physical and spiritual well-being in an overdeveloped Bay Area megalopolis, we must preserve our open space bayfront. Measure P will protect our unique and irreplaceable waterfront for present and future generations. Join leading environmentalists in voting YES on P.

s/Councilmember John Denton, Attorney, Chair Council Waterfront Committee.

s/David Brower, Board Member National Sierra Club, Berkeley Native.

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund.

s/Dona Spring, Convenor East Bay Defenders of the Environment.

s/Alan Goldfarb, Member Berkeley Planning Commission.

City of Berkeley Proposed Ordinance

Measure Q: Shall an ordinance be adopted which requires zoning to limit development on the entire waterfront and which protects its ecology and open-space in accordance with the Community Planning Process of 1984-86?

Financial Implication: Administrative costs; amount unknown. ☐ YES ☐ NO

## Full Text of Measure Q

BE IT ORDAINED by the People of the City of Berkeley as follows:

That the following policies be incorporated into the Master Plan, the Waterfront Specific Plan, and the Zoning Ordinance.

Section 1: Findings

The People of the City of Berkeley find that it is in the public interest to preserve and protect the open space, views, wetlands, tidal mudflats, seasonal ponds, wetlands-type environment, creeks, meadows, beaches and the low density character of the unique and irreplaceable waterfront area of the City, being all that land in the City of Berkeley generally adjacent to San Francisco Bay and lying west of Interstate Highway 80 and east of Marina Boulevard.

The People of Berkeley further find, based on numerous scientific studies and data, including those developed during the Waterfront Planning Process of 1984-86, and in the draft Environmental Impact Report of June 1986, that the portion of the waterfront area south of the northern edge of Virginia Street (as extended westward), and including School House Creek, constitutes environmentally sensitive, irreplaceable, and unique wetlands, marshes, seasonal ponds, meadows, wildlife habitat, and other features of the natural ecology; and that it is in the public interest to preserve, protect, reclaim, and/or restore all said portion of the waterfront in a natural, open, and undeveloped form.

These actions are necessary to protect the public health, safety, and welfare and to avoid unnecessary conversion of open space land to high density urban uses, thereby protecting against the resultant adverse impacts, such as: disturbance of wetlands and wetlands-type environment; destruction of wildlife habitat, including that of endangered and protected species; diminishing the ecological health of San Francisco Bay; hazards relating to geology, landfill, flooding, and earthquakes; destruction of scenic beauty; air, noise, and water pollution; increases in traffic on freeway, city streets, and intersections to unacceptable levels; rise

in housing costs and subsequent displacement of low-income people from contiguous neighborhoods in West Berkeley; and other demonstrated consequences of overly dense urban development.

Section 2: Purpose

The purpose of this ordinance is to establish policies and uses which:

(a) provide special protection to the unique and irreplaceable San Francisco Bay shoreline ecology, including, but not limited to, seasonal ponds, wetlands, mudflats, meadows, beaches, marshes, creeks, and tidelands;

(b) protect the open space and enhance the recreational uses and low density character of the entire waterfront area;

(c) protect and preserve views from the waterfront to the rest of the city, and from the rest of the city to the waterfront;

(d) guarantee and maximize access to the shoreline area by citizens of Berkeley and the State of California and guarantee that a continuous shoreline corridor or esplanade at least 100 feet wide shall be dedicated to the public for access by pedestrians, the disabled, and bicylists; provided, however, that such access shall not damage the delicate ecology of the area; and

(e) ensure that any development in the waterfront area occurs in a prudent manner, while protecting the City's residents from overly dense urban development in areas which are ecologically fragile and/or irreplaceable.

Section 3: Policies

(a) Meadow.

That area of the Berkeley Waterfront bounded by the freeway on the east, by the south sailing basin on the south, by Marina Boulevard on the west, and by the north sailing basin and by the northern edge of Virginia Street (as extended west to the Bay) on the north, commonly known as the Meadow, shall be retained as open space, except as provided in Section 3(c)(4) below. Open space uses which do not require the construction of structures on the Meadow may be allowed on the Meadow, provided that such

uses are consistent with the findings, purposes, and policies stated above, and provided further that any adverse environmental impacts by satisfactorily mitigated on site.

(b) Brickyard and Beach.

That peninsular portion of the Berkeley Waterfront south of the Meadow to Emeryville, commonly known as the Brickyard, and that the water's-edge portion of the waterfront south of University Avenue, commonly known as the Berkeley Beach, shall be retained as open space, except that a nature interpretive center of no more than one story, with a height of no more than 20 feet above current ground level, and with an area of no more than 5,000 square feet of floor space may be constructed on the Brickyard. Open space uses which do not require the construction of structures on the Brickyard and Beach may be allowed on the Brickyard and Beach, provided than such uses are consistent with the findings, purposes, and policies stated above, and provided further than any adverse environmental impacts be satisfactorily mitigated on site.

(c) North Beach Strip and Horse Barns.

(1) That portion of the Berkeley Waterfront north of the Meadow, east of the Bay, and south of Gilman Street, commonly known as the North Basin Strip, and that portion of the Berkeley Waterfront north of Gilman Street, east of the Bay, and south of the Albany city line, commonly known as the Horse Barns area, shall be designated for development.

(2) The total amount of development allowed in this area may not exceed 565,000 square feet. No building may be constructed which exceeds two stories, or which exceeds 25 feet in height above the current (1986) ground level, except that up to 50,000 square feet of this amount of development may be placed in a third story, in a building or buildings not to exceed 35 feet in height above the current (1986) ground level, if the appropriate city design review board determines that a plan which includes such increase in height is desirable both for aesthetic reasons and to carry out the policies set forth above. Permitted uses in this area are limited to the categories of uses for this area set forth in the draft Waterfront Specific Plan of May 9, 1986, (which

categories include lodgings, conference center, restaurants, retail shops, recreational uses, and open space uses) plus buildings appurtenant to any open space use of the Meadow or Brickyard.

(3) The above-described development may be allowed only if the landowner or developer establishes that any adverse environmental impacts, including, but not limited to, those described in the June 1986 draft Environmental Impact Report, including, but not limited to, traffic, geology, wetlands, and endangered-species problems, will be satisfactorily solved or mitigated. Any adverse impacts as to wetlands shall be mitigated on property within the Berkeley waterfront, as defined above.

(4) If the landowner or developer demonstrates to the City's satisfaction that it is economically and legally infeasible to place all the development described in Section 3(c)(2), above, in a location north of Virginia Street (as extended westward), then the City may permit some of that development to be situated south of Virginia Street (as extended westward) provided: (1) that the amount of development (including structures and parking) located south of Virginia Street shall be kept to a minimum; (2) that any such development south of Virginia Street may occupy a site of no more than 12 acres of land; (3) that this development shall be located as far north and as far east on the Meadow as possible, and shall not encroach on that portion of the Meadow which is west of the North Basin Strip shoreline, if that line were extended due south to University Avenue; and (4) that the above-described development may be allowed only if the landowner or developer establishes that any adverse environmental impacts, including, but not limited to, those described in the June 1986 draft Environmental Impact Report, including, but not limited to, traffic, geology, wetlands, and endangered-species problems, will be satisfactorily solved or mitiaged. Any adverse impacts as to wetlands shall be mitigated on property within the Berkeley waterfront, as defined above.

"Economically and legally infeasible" is defined as follows: the landowner or developer must establish that there was a lease between it and the Pacific Racing Association which existed as of January 1, 1986; that said lease did and does render it legally and financially infeasible to construct the approved development on

the North Basin Strip north of Virginia Street, that the lease represents the sole reason for any inability to develop prior to the lease's expiration date, and that said lease cannot reasonably be modified at a reasonable cost. "Reasonable cost" means that the cost or fair market value of modifying the lease, as determined by the City, is such that it would not make the contemplated construction north of Virginia Street financially infeasible.

"To the City's satisfaction", as used in this subsection, is defined as follows: the City Council must find, by a vote of more than ⅔ of the Council members, based on a preponderance of the evidence, that such development in this location is necessary to carry out the purposes and policies of this ordinance.

Section 4: Programs and Time Limits

Within six (6) months of the effective date of this ordinance the City of Berkeley's Master Plan, Zoning Ordinance, and Waterfront Specific Plan shall be amended to incorporate and conform to the policies contained in this ordinance. However, the policies contained in this ordinance shall be in force as soon as the ordinance takes effect. These policies shall be implemented in a manner which avances the findings and purposes listed above.

Section 5: Constitutionality

This ordinance is not intended to authorize, and shall not be construed as authorizing, the City of Berkeley to exercise its power in a manner which will take or damage private property for public use. This ordinance is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Section 6: Severability

If any portion of this ordinance is hereafter determined to be invalid, all remaining portions of this ordinance shall remain in full force and effect, and to this extent the provisions of this ordinance are severable.

Section 7: Amendment

No part of this ordinance shall be amended or repealed, except by a vote of the people.

Section 8: Effective Date

This ordinance shall take effect immediately upon its passage by the voters of the City of Berkeley.

Berkeley City Attorney Analysis of Measure Q

The proposed ordinance, of adopted, would regulate development on certain areas of the Berkeley Waterfront currently owned by Santa Fe Land Improvement Company ("Santa Fe") in the following manner:

1. Prohibit the construction of any structures on the area commonly known as the Meadow bounded by the freeway on the east, by the South sailing basin on the south, by Marina Boulevard on the west and by the north sailing basin and the northern edge of Virginia Street (as extended West to the Bay) on the north unless the City Council determines, by a two-thirds vote, based on a preponderance of the evidence, that development north of Virginia Street is legally and financially infeasible because of the existence of a lease entered into between Santa Fe and the Pacific Racing Association as of January 1, 1986, which may preclude any such development until 1997. In such case the City may permit the minimum development necessary to address any such legal constraints imposed by the lease as long as any such development is located as far as possible to the north, does not encroach west of the North Basin Strip shoreline if that line were extended due south to University Avenue and does not occupy more than twelve acres of land.

2. Prohibit the construction of any structures on the peninsula area commonly known as the Brickyard south of the Meadow and on the water's edge area commonly known as the Berkeley Beach except for a nature interpretive center of no more than one 20-foot story containing no more than 5,000 square feet of floor space.

3. Require that, except as provided for, the Meadow, Brickyard and Berkeley Beach be retained as open space. Open space uses which do not require construction of structures are permitted to the extent they are consistent with the purposes of the ordi-

nance such as the protection of San Francisco Bay Shoreline ecology.

4. Authorize up to 565,000 square feet of development in the area north of the Meadow, east of the Bay, South of Gilman Street, commonly known as the North Basin Strip and that area north of Gilman Street, east of the Bay, and south of the Albany City line commonly known as the Horse Barns area. The development must be limited to the categories of uses set forth in the draft Waterfront Specific Plan of May 9, 1986 (e.g. lodgings, conference center, restraurants, retail shops, recreational uses and open space uses) and the buildings are limited to two stories unless a third story is permitted by a City design review board for aesthetic reasons or to carry out the purposes of this ordinance.

5. Require, within six months of passage of the ordinance, that the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to incorporate the policies contained in the ordinance.

Under the City Plan in effect on August 8, 1986, the waterfront is designated as "unclassified" and, thus, any development may be approved upon a finding of no detriment by the Board of Adjustments or the City Council on an appeal. As of August 8, 1986, the date this analysis was prepared, the City is completing a three-year planning process in which it has tentatively approved a plan for the waterfront and is in the process of receiving public comments on the Environmental Impact Report which the City commissioned regarding the proposed plan. This ordinance differs from the current proposed plan in one major respect. The current proposed plan calls for public acquisition of the Brickyard, the Berkeley Beach and 50 acres of the Meadow, whereas this ordinance requires that these areas remain as open space, irrespective of whether the City actually buys the land from Santa Fe. Public acquisition of any of the land required to remain open space would be permissable.

This ordinance differs from the initiative ordinance on the waterfront in two major respects:

(a) it allows construction of structures on up to twelve acres of the Meadow east of the North basin shoreline extended due south

if the City determines that development in the North Basin Strip is legally and financially infeasible because of a lease existing as of January 1, 1986 between Santa Fe and the Pacific Racing Association;

(b) it limits development in the North Basin Strip to 565,000 square feet, imposes a height limit on buildings constructed, and limits the category of uses permitted to those set forth in the City's draft waterfront specific plan of May 9, 1986. The initiative ordinance leaves these issues to be decided by the City Council. As of August 8, 1986, the City Council proposes to authorize a level of development which is within the limits imposed by this ordinance.

If both measures pass, the one which receives the most votes will supersede any conflicting provisions of the other.

Financial Implications

Additional administrative costs to revise the City's plans and zoning ordinance in an amount unknown at this time.

Argument in Favor of Measure Q

Measure Q preserves maximum open space and the natural environment of our Waterfront. This measure supports the waterfront plan which was developed over a two year planning process involving extensive community participation. The SIERRA CLUB and leading environmentalists support the plan which is sensitive to the natural features of the site and which encourages the creation of an East Bay Shoreline Park.

Measure Q:

**Requires permanent open space zoning for the irreplaceable natural resources of the Brickyard, Beach and Meadow.

**Assures public access and increased recreational opportunities.

**Limits traffic congestion on I-80 and West Berkeley streets by restricting development on the Waterfront.

In addition, Measure Q is the ONLY waterfront plan on the ballot that:

**Places an absolute cap on all development on the privately owned lands at the Waterfront.

**Limits heights of new structures to protect views of the Bay and the Berkeley Hills.

**Assures design review of any new structures on the Waterfront.

**Is supported by the SIERRA CLUB.

Measure Q is the legally defensible plan for assuring that a maximum amount of open space will be preserved on the Waterfront, now and forever.

Santa Fe Land Improvement Company, the waterfront owner has repeatedly sued the City of Berkeley to force approval of its plan for FOUR AND A HALF MILLION SQUARE FEET of building, up to TEN STORIES IN HEIGHT. Overdevelopment by Santa Fe would result in massive traffic jams, destruction of the natural ecology and views, and displacement of low and moderate income residents and community business people from West Berkeley. Measure Q offers the best legal defense against Santa Fe's well financed assault on our waterfront environment and the wishes of the citizens of Berkeley. Please join the SIERRA CLUB and other leading invironmentalists in supporting Measure Q.

s/Veronika Fukson, Vice-Mayor
s/Jim Liljenwall, Chair, Waterfront Commission
s/Toni Mester, Berkeley Coordinator, Sierra Club East Bay Shoreline Park Task Force
s/Loni Hancock, Waterfront Commission
s/Edward Bennett, Exec. Comm. Bay Chapter of the Sierra Club

Rebuttal to Argument in Favor of Measure Q

Measure Q allows Santa Fe to build a giant hotel and conference center, twice the size of the controversial Golden Bear

complex, on Berkeley's waterfront Meadow. The restrictions in Measure Q are not enforceable. If Q passes, this hotel can be built.

Measure Q is an environmental disaster. This 450-room hotel will occupy 12 acres of the Meadow's east end, the most ecologically sensitive area of the waterfront. An irreplaceable wetland habitat will be destroyed. Traffic congestion on the waterfront and in West Berkeley will worsen dramatically. Panoramic views of the Bay will be obstructed.

With a 450-room Santa Fe hotel on one side and the 400-room Marriott Inn on the other, development advocates will want to commercialize the remaining Meadow. Any open space left could end up a private park for hotel guests. Berkeley residents will lose access to their own shorefront.

Measure Q allows more development and taller buildings than the public wants. It locks in the large-scale development sought by pro-development planners, consultants, and politicians and ignores the community's desires. If passed, Measure Q could only be undone by a future ballot measure, no earlier than 1988.

Don't be deceived. Measure Q was placed on the ballot to allow large-scale development on the Meadow. Don't let pro-development politicians and planners turn our magnificent open space waterfront into a Miami Beach-by-the-Bay. Vote NO on Q.

Measure P, the citizens' initiative, will preserve our open space bayfront. Vote YES on P.

s/Councilmember John Denton, Attorney, Chair Council Waterfront Committee
s/Rosalind Lepawsky, Executive Director of Urban Care
s/Ruth Boyden, Early member of Berkeley Waterfront Advisory Board
s/Francis Violich, Professor of City Planning Emeritus UC Berkeley
s/Irv Rautenberg, Director Bayfront Conservancy Fund

## Argument Against Measure Q

Measure Q gives Santa Fe the right to build a hotel and conference center, twice the size of the controversial Golden Bear complex, on Berkeley's waterfront "Meadow," the open field between the Marina and Interstate 80. Such a giant development would be an environmental disaster, would increase traffic congestion and pollution, and would obstruct panoramic views of the Bay.

The City's waterfront environmental Impact Report identifies the seasonal ponds on the Meadow as a migratory bird habitat. Numerous waterbirds frequent the site, including the endangered brown pelican and the California least tern. Most of these ponds are on the Meadow's east end, exactly where Measure Q would allow Santa Fe's real estate corporation to build its hotel. This ecologically sensitive habitat cannot be replaced, not its loss mitigated. If Measure Q passes and the hotel is built, this wildlife habitat would disappear. So would the panoramic views and the waterfront's calming and restorative qualities.

Under Measure Q, development could cover 12 acres of the Meadow. More land would be eaten up by parking lots and roads. Eventually there would be pressure to make the hotel even larger. (The Marina Marriott recently was allowed to build a four-story addition.) Any remaining Meadow open space would end up a private park for hotel guests, and local residents would lose access to the bayfront.

Don't be fooled. Measure Q was placed on the ballot to deceive voters and to defeat Measure P, the citizens initiative that preserves the entire Meadow. 3,600 Berkeleyans placed Measure P on the ballot to protect the waterfront. Don't give away the beauty and integrity of Berkeley's waterfront. Vote No on 'Q'. Vote YES on 'P'.

s/City Councilmember John Denton, Chair Council Waterfront Committee

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund

s/Gerda Miller, Convenor Berkeley Gray Panthers

s/Irv Rautenberg, Director Berkeley Bayfront Conservancy Fund

s/Charles "Ozzie" Osborne, Elmwood Preservation Activist

Rebuttal to Argument Against Measure Q

Measure Q was written by the Sierra Club waterfront taskforce to fix the mistakes of Measure P. The Sierra Club taskforce originated the plan to preserve the Meadow and the Brickyard as open space and place all development along the freeway north of the Meadow; to claim that it wants to deceive voters is ridiculous.

Measure Q no more allows Santa Fe to build a hotel-conference center on the Meadow than does Measure P. Both measures oppose any such development. If Santa Fe is able to build or restrict access on any part of the Meadow, it will be in spite of these measures and only if court decision, unwisely, require it.

Measure Q faces up to the fact that Santa Fe and its team of lawyers will continue to try to pressure the city into allowing massive waterfront development—up to 4½ million square feet of it, with buildings ten stories high. Measure Q enacts the strongest possible legal defense to such pressure.

Measure Q repairs another defect in Measure P by placing an absolute limit on the extent and height of buildings. Without such limits, the section along I-80 north of University Avenue could someday look like another Emeryville.

It's too bad that environmentalists disagree on the best way to preserve our waterfront. The Sierra Club taskforce would not have written this ballot measure unless it was necessary.

IT IS NECESSARY. VOTE YES ON MEASURE Q.

s/Edward Bennett, Executive Committee, San Francisco Bay Chapter, Sierra Club

s/Don Forman, Conservation Chair, San Francisco Bay Chapter, Sierra Club

s/Helen King Burke, Director, EBMUD

s/Jerry Fillingim, Labor Activist, City Council Candidate

s/Matt Crawford, Member, Waterfront Commission

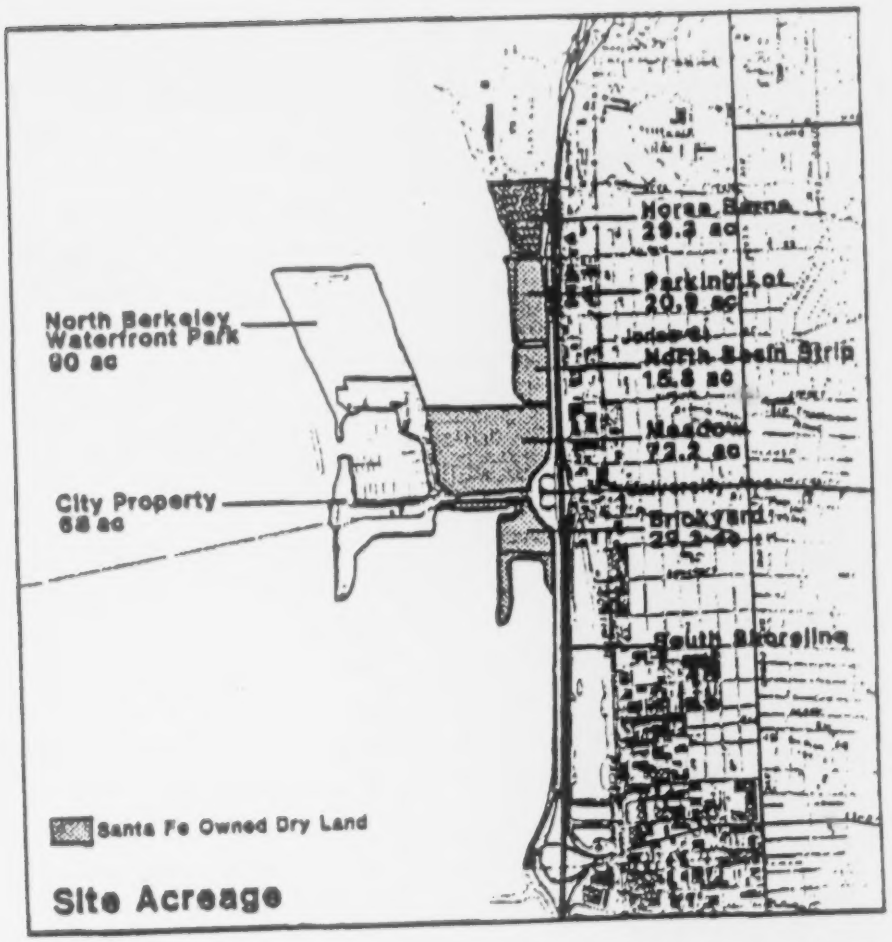
North Berkeley
Waterfront Park
90 ac
City Property
68 ac
Horse Barns
29.2 ac
Parking Lot
20.9 ac
Jackson
North Basin Strip
18.8 ac
Meadow
72.2 ac
Brickyard
29.3 ac
South Shoreline
Santa Fe Owned Dry Land
Site Acreage
Berkeley Waterfront
0
2000
4000

EXHIBIT A

Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1591

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1988

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
*Petitioner,*

VS.

CITY OF BERKELEY,
a Municipal Corporation,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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35pp

## QUESTIONS PRESENTED

1. Whether a landowner may initiate an action in federal court alleging that a land use ordinance as applied to its property effects a taking in violation of the just compensation clause of the fifth amendment without first submitting a development application to a public agency pursuant to the current land use plans and ordinance and receiving a final decision applying these regulations to the development application.

2. Whether the Ninth Circuit may reject conclusory allegations that submitting a development application pursuant to an ordinance specifying uses and intensity of development would be futile when the court finds that the local agency has discretion to apply the challenged ordinance flexibly.

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No. 88-1591

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OCTOBER TERM, 1988

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a Delaware Corporation,
*Petitioner,*

VS.

CITY OF BERKELEY,
a Municipal Corporation,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent City of Berkeley respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## STATEMENT OF THE CASE

The City of Berkeley ("City") commences its Opposition Brief with this second Statement of the Case because Santa Fe, in its Statement of the Case, has taken manifold liberties with the facts. Santa Fe has omitted essential relevant facts, misrepresented facts alleged, and portrayed legal conclusions as factual allegations.[1] What follows is a correction of erroneous statements, a more balanced presentation of the relevant planning and legal history, and a fuller description of the land use plans and ordinance at issue in this case.

*The City's Planning Process For The Waterfront.*

Santa Fe's Petition for Writ of Certiorari ("Petition") repeatedly asserts that during the past twenty years it has unsuccessfully "pursued every conceivable avenue available to it" to gain City approval of "some reasonable and economically viable use of its [Berkeley Waterfront] property." Petition at 4; *see also id.* at 3, 5, 9, 10. Santa Fe's account of efforts to develop this privately-owned stretch of the Berkeley Waterfront, on the San Francisco

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[1] The Statement of the Case in Santa Fe's Petition for Writ of Certiorari is riddled with legal conclusions masquerading as factual statements. *See, e.g.,* Petition at 3 ("The unalterable terms of the ordinance are so restrictive that they preclude any economically viable development of Santa Fe's property"); 9 ("[T]he maximum development permitted by Measure Q was confiscatory"); and 11 ("[T]he confiscatory development limits in voter- imposed Measure Q could not be amended by the City Council even if Santa Fe filed an application"). The Ninth Circuit has repeatedly stressed that a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex. rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986). *See also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Bay, misleads the court by suggesting that the City has spent the last twenty years rejecting Santa Fe's development proposals. *Id.* at 3. In fact, almost all of the last twenty years has been devoted to litigation between the City and Santa Fe and to the City's recent three year planning process that resulted in the plans and ordinance challenged herein.

Before the City's recent planning efforts for the Waterfront began, there had never been a systematic attempt to formulate goals and policies to guide development of this area. CR 19, Exh. 2 at 89.[2] In 1951, the City's Waterfront had been rezoned from "Industrial" to "Unclassified," a zoning designation which allowed any type of development consistent with the City's Master Plan. *Id.* at 85, 89. During the 1950's, the City received proposals to fill substantial portions of the San Francisco Bay off the Berkeley shoreline for non-water-related uses. *Id.* at 86. The public strongly opposed such proposals, leading the City Council to solicit alternative proposals. *Id.* at 85-86.

Against this backdrop, the City in 1970 received a proposal to develop a regional shopping center on that portion of Santa Fe's property known as the Meadow. After the City rejected this large-scale development proposal, the property owners, George Murphy and Santa Fe, sued the City in inverse condemnation for twelve million dollars each. The state of California entered the case, raising the issue of the extent of the public trust on the Meadow property which was former tideland that had been filled after Santa Fe's predecessors acquired the property from the state. CR 19, Exh. 2 at 87. This litigation spanned more than ten years during which time the parties focused upon the court proceedings, awaiting guidance from the California Supreme Court as to whether Santa Fe's property holdings along Berkeley's shoreline were free of the public trust. The court's resolution of the public trust issue would define the range of permissible uses of the Waterfront area. *See City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, *cert. denied*, 449 U.S. 840 (1980); *see also* CR 19, Exh. 2 at 87.

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[2] Citations to CR are to the Clerk's Record in the Court of Appeals.

Once the public trust issue was resolved and the case settled, Santa Fe and the City began discussions in the spring of 1982 regarding future development of Santa Fe's waterfront property. CR 1 at ¶ 28. At this time, Santa Fe announced its intent to develop more than four million square feet of commercial space on its waterfront property. CR 19, Exh. 2 at 89.

Thereafter, in the spring of 1983, the City initiated its formal public-planning process that would culminate, three years later, in the adoption of the Waterfront Plan Amendment to the City's Master Plan ("Waterfront Plan") and the Waterfront Specific Plan ("Specific Plan").[3] CR 19, Exhs. 2 and 3 respectively; *see also* Order Dismissing Complaint issued by the United States District Court for the Northern District of California ("Order"), *reprinted in* Appendix to Petition ("App.") at A-14, A-15.

This planning process included a lengthy series of studies, analyses, workshops, and public hearings. *See generally*, CR 19, Exh. 2 at 89-93; Order, App. at A-15. The City analyzed a number of difficult issues, including traffic congestion, environmental constraints, scenic impacts, economic effects, and preservation of open space along the shoreline of the East Bay. CR 19, Exh. 2 at 35-74.[4] The City also solicited development proposals from a broad range of individuals and organizations in the Berkeley community. *Id.* at 89.

The purpose of this process was to devise a comprehensive plan for the only large undeveloped area remaining in the City, to protect the interests of the citizens of Berkeley, and to assure a reasonable financial return to Santa Fe. *Id.* at 1-2, 4-7, 92. In regard to the latter goal, the City was mindful throughout the planning process that its development restrictions could not deprive Santa Fe of its constitutionally guaranteed property rights:

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[3] The City's Opposition Brief refers collectively to these two plans as "the Waterfront Plans."

[4] A list of the many reports prepared by the City during the development of the Waterfront Plan is found at CR 19, Exh. 2 at 107-08.

> Special attention was given to the economics of Waterfront development, to assure that the plan would allow for a reasonable economic return to the property owner.

*Id.* at 92. In furtherance of that effort, City consultants prepared economic feasibility analyses. *Id.* at 90. During the latter half of 1985 and 1986, the City Council considered a variety of development alternatives presented by its consultants as well as an environmental impact report which analyzed the potential adverse impacts of these development alternatives. *Id.* at 92-93. *See also id.* at 120 (CEQA Findings rejecting less intense development alternatives as potentially economically unviable).

Santa Fe's "applications" were submitted to the City prior to and during this three year planning process. *See* Petition at 4-6; Order, App. at A-19 to A-20. The City, in order to complete its planning process before evaluating and acting upon Santa Fe's applications, resorted to a well-accepted planning tool. It adopted time-limited moratoriums on the issuance of permits for Santa Fe's property, thereby postponing consideration of premature development proposals until the City could adopt a comprehensive plan for the affected area. These consecutive, short-term moratoriums were in effect from June 4, 1985 until July 31, 1986. CR 1 at ¶¶ 42, 45, 48; Order, App. at A-16. They were enacted under the express authority of California law. Cal. Gov't Code § 65858 (West 1983).

*The Waterfront Plans And Measure Q.*

On October 7, 1986 the City Council adopted the Waterfront Plans. CR 1 at 54. These planning documents conform to state law, both in their content and specificity. Both plans provide a detailed list of policies establishing development parameters for Santa Fe's undeveloped waterfront property. The plans do not address the already developed portions of the Waterfront owned by the City.[5]

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[5] During the 1960's, the City expanded its Yacht Club along the Berkeley Waterfront, first established in the 1920's, with a loan from the State Small Craft and Harbor Department. One term of the loan repayment was the requirement that the City develop restaurants and a

The Waterfront Plan is an amendment to the City's master or general plan. *See* Cal. Gov't Code §§ 65300, 65350 (West Supp. 1989).[6] The general plan may be adopted as a group of documents relating to geographic segments of the planning area. *Id.* § 65301(b). Proper planning as well as logic dictates that the City should plan for this large parcel of undeveloped land as one discrete unit.[7]

The Specific Plan was prepared in order to implement the general plan in the waterfront area. Cal. Gov't Code § 65450. As required, the Specific Plan is consistent with the City's master plan. *Id.* § 65454. Moreover, the Specific Plan was prepared according to the detailed requirements of state law which mandate the contents of specific plans. *Id.* § 65451(a). Thus, specific plans must include, inter alia, the distribution, location, and extent of the uses of land, including open space, within the area covered by the plan. The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy and other essential facilities must also be detailed in the specific plan. *Id.*[8]

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hotel on City property in the vicinity of the yacht harbor. The City complied with this requirement, leasing space for the establishment of a hotel and two restaurants. CR 19, Exh. 2 at 85.

[6] The contents of the master or general plan are mandated by state law. Each such plan must contain seven elements. Cal. Gov't Code § 65302. Moreover, "[t]he degree of specificity and level of detail of the discussion of each such element shall reflect local conditions and circumstances." *Id.* § 65301(c).

[7] Santa Fe places great importance on the fact that Measure Q and the Waterfront Plans are directed solely at Santa Fe's property, suggesting that this fact somehow evidences the unlawfulness of the challenged legislative enactments. *See, e.g.*, Petition at 4, 5, 7, 12. That the process affected only Santa Fe's property is merely an unintended consequence of the fact that Santa Fe is the owner of all of the undeveloped waterfront property in the City.

[8] Santa Fe makes much of the "highly detailed requirements and restrictions" (Petition at 6) found in the Specific Plan, suggesting that such specificity relieves Santa Fe of its duty, under the finality doctrine,

The Specific Plan also contains detailed provisions governing applications to develop Santa Fe's property (a "Master Development Plan") pursuant to the Specific Plan. CR 19, Exh. 3, Section 7.3. The City's Planning Commission reviews and thereafter issues its decision either approving or disapproving any application for a Master Development Plan. *Id.* Section 7.3.9. The Planning Commission's decision may be appealed to the City Council. *Id.* Section 7.3.11.

In November 1986, one month after the adoption of the Waterfront Plans, the voters enacted a complementary initiative, Measure Q. (For the text of Measure Q, see App. at A-44 to A-49.) The City's November 1986 ballot, in fact, contained two proposed ordinances governing development of Santa Fe's waterfront property.[9] Ballot arguments and campaign literature referred to the second ballot measure, Measure P, as "the citizen's initiative," to distinguish it from Measure Q which had been placed on the ballot by the Berkeley City Council.[10] App. at A-54. (For the text of Measure P, see App. at A-34 to A-37.)

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to file a meaningful development application. Of course, Santa Fe is unable to cite any authority for the proposition that the City's compliance with relevant planning statutes brings Santa Fe within the narrow futility exception to the ripeness requirement.

[9] If a ballot contains two or more initiatives with conflicting provisions on the same subject, the measure which receives the most votes becomes law. App. at A-39. In this case, both Measure Q and Measure P passed, the former receiving more votes and thus becoming the law.

[10] Ironically, given Santa Fe's portrayal of Measure Q throughout this litigation, the ballot arguments in support of Measure P and against Measure Q depict the latter ordinance as "the pro-development Measure 'Q'." App. at A-39. These ballot arguments assert that Measure Q "locks in the large-scale development sought by pro-development planners, consultants, and politicians. . . ." App. at A-53. The ballot argument against Measure Q cautions "Don't be deceived. Measure Q was placed on the ballot to allow large-scale development on the Meadow. Don't let pro-development politicians and planners turn our magnificent open space waterfront into a Miami Beach-By-The-Bay." *Id.*

The findings adopted by the citizens of Berkeley as a part of Measure Q state that it is in the public interest to preserve and protect the open space, views, wetlands, beaches, and low density character of the waterfront area of the City. Measure Q, Section 1, App. at A-44. In addition, the measure states that a portion of the waterfront area constitutes environmentally sensitive and irreplaceable wetlands, meadows, marshes, and wildlife habitat. *Id.*[11]

Measure Q sets a development maximum of 565,000 square feet on Santa Fe's property (Measure Q, Section 3, App. at A-46) subject to constitutional limitations. *Id.* Section 5, App. at A-48. The ordinance specifies where on the property the allowable development may be located, with some flexibility given to the City to locate development elsewhere on Santa Fe's property if necessary. *Id.* Section 3, App. at A-45 to A-47.

Section 7 of Measure Q provides that the ordinance shall not be amended, except by a vote of the people. *Id.* Section 7, App. at A-48. Finally, the ordinance specifies that it shall not be construed as authorizing the City to exercise its power in a manner which will take or damage private property for public use. Measure Q, by its explicit terms, is not intended to increase or decrease the rights of any owner of property under the Constitution of the United States or the state of California. *Id.* Section 5, App. at A-48.

*Proceedings Below.*

Santa Fe initiated this action four months after the voters of Berkeley enacted the challenged Measure Q. It alleged that the Waterfront Plans and Measure Q effect a taking as applied to its property in violation of the just compensation clause of the fifth amendment of the United States Constitution. Santa Fe also alleged denial of due process and equal protection under the

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[11] The Environmental Impact Report prepared on the Waterfront Plans (CR 19, Exh. 2 at 93) identified 17 acres of seasonal ponds on the Meadow area as a migratory bird habitat. Such species of waterbirds as the endangered brown pelican and the California least tern frequent Santa Fe's Waterfront site. App. at A-39.

fourteenth amendment and deprivation of civil rights under 42 U.S.C. section 1983. Petition at 1. Santa Fe has been unwilling to submit a Master Development Plan application to the City and thereafter to participate in the planning process envisioned by the Specific Plan. CR 19, Exh. 3, Section 7.3. Instead, following the enactment of the waterfront planning measures, Santa Fe chose to go directly to federal court seeking massive monetary damages against the City for alleged deprivations of its constitutional rights.

The City filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), challenging the court's subject matter jurisdiction over the entire action on the grounds of ripeness. After hearing oral argument by the parties, the District Court ultimately determined that this case fits comfortably within all of the recent Supreme Court and Ninth Circuit precedents. The court dismissed Santa Fe's entire complaint because it had "not yet obtained a final regulatory determination regarding the development of its property, and thus has failed to present the court with a justiciable controversy." Order, App. at A-14.

The District Court's order dismissing Santa Fe's complaint contained a number of findings which are of particular relevance to Santa Fe's pending Petition. First, the District Court found that the development applications and proposals that Santa Fe submitted to the City during the period preceding the City's enactment of the challenged Waterfront Plans and Measure Q do not satisfy the final decision requirement. *Id.* at A-19 to A-21. The District Court reasoned:

> "The required submission of at least one meaningful development application prior to bringing suit presumes that the preceding application is made pursuant to the current zoning ordinances and procedures; otherwise, there can be nothing final about the challenged regulatory act, since it represents the product of a regime no longer governing the decisions of the planning authority."

Order, App. at A-20.

Second, the District Court rejected Santa Fe's alternative claim that Measure Q and the Waterfront Plans represent the City's

final adjudication of Santa Fe's earlier development applications, noting that this argument "significantly misconstrues the express terms of the 1986 enactments." *Id.* at A-21. The court reasoned that Measure Q's Section 5, by its plain language, explicitly vests discretion in City officials to alter the type and intensity of development allowed on Santa Fe's property if the landowner could demonstrate *during the application process* that the development limits specified in the City's 1986 enactments "interfered with its reasonable investment-backed expectations." *Id.* at A-22.

Finally, in stark contrast to Santa Fe's searing indictment of the City, the District Court found that the record did not demonstrate that the City had engaged in "an unfair tactical ploy to avert litigation." *Id.* at A-21 n.2. The City had not manipulated the zoning process by either enacting new ordinances each time Santa Fe submitted a development application or indefinitely imposing moratoriums on use permit applications. Indeed, in 1986 the City rezoned Santa Fe's property for the first time since 1951, and then only after a three-year planning process in which Santa Fe and the public "played a significant part." *Id.*

Santa Fe appealed the District Court's dismissal of its claims. On August 29, 1988, the United States Court of Appeals for the Ninth Circuit issued its unpublished memorandum decision, affirming the District Court's dismissal for lack of subject matter jurisdiction.[12] Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit ("Memorandum"), *reprinted in* App. at A-26. The Ninth Circuit, relying on both Ninth Circuit and Supreme Court precedent, held that Santa Fe could not demonstrate that the City had rendered "a final and authoritative determination of the type and intensity of development

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[12] The Ninth Circuit's memorandum decision addressed only the taking claim. *See* App. at A-26. Neither the District Court nor the Ninth Circuit ruled on the facial validity of the regulations, as Santa Fe failed to pursue this issue in the District Court in its opposition to the City's motion to dismiss Santa Fe's entire action. *See* discussion in Appellee's Ninth Circuit Brief at 41-44. Santa Fe's petition for certiorari is limited to the issue of whether the Ninth Circuit properly determined that the ripeness doctrine bars consideration of Santa Fe's takings claim as applied to its property. Petition at i.

legally permitted on [its] property." *Id.* at A-28 (quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986)). Noting that Santa Fe had failed to submit a meaningful application under Measure Q, that is, one that is not for "exceedingly grandiose development," the court refused to recognize Santa Fe's claim that submission of an application would be futile. *Id.* at A-29 & n.1. As the District Court had already concluded, the Ninth Circuit determined that Section 5 of Measure Q provided the City with discretion to apply the ordinance's terms flexibly. *Id.* at A-30 n.3.

Following the court's affirmance of the District Court's dismissal, Santa Fe petitioned for rehearing on September 12, 1988. Ten days later, Santa Fe wrote to the Ninth Circuit advising the court that the September 13, 1988 modification of its decision in *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989), directly related to Santa Fe's petition for rehearing. The Ninth Circuit subsequently ordered the City to file a response to the petition for rehearing. App. at A-31.

In responding to Santa Fe's petition for rehearing, the City primarily focused on the Ninth Circuit's recent revision of the ripeness portion of its opinion in the *Herrington* case. The City's brief elucidates why the Ninth Circuit's earlier dismissal of Santa Fe's claim was still entirely consistent with the court's explication of the ripeness doctrine in *Herrington*. Answer to Appellant's Petition for Rehearing at 2-8.

The City's answer to the petition for rehearing notes that the City has developed a Master Development Plan application, based on the Waterfront Plans, which gives full effect to Measure Q. *Id.* at 10-11; *see id.* Exh. A (Master Development Plan application). In particular, an applicant seeking to develop the Waterfront property presently owned by Santa Fe must provide data to support any claim that the 565,000 square feet of development permitted on Santa Fe's property under Measure Q would result in a taking of the property. *Id.* at 11. If the Master Development Plan application reveals that the economic assumptions the City utilized in establishing the Waterfront Plans' density and use limits were erroneous, Section 5 of Measure Q

would require the City to alter these limits so as to enforce the ordinance in a way that would not effect a taking of Santa Fe's property. *Id.* at 10-11.

After considering Santa Fe's Petition for Rehearing, the City's Answer, and, presumably, the modification in *Herrington*, the Ninth Circuit on January 3, 1989 denied Santa Fe's Petition for Rehearing. App. at A-32.

## REASONS FOR DENYING THE WRIT

### A. The Ninth Circuit's Determination That Santa Fe's Takings Claim Is Not Ripe For Judicial Review Presents No Issues Meriting Supreme Court Review.

A careful reading of Santa Fe's Petition leads to one conclusion —Santa Fe's quarrel is with the result in this particular case rather than with the Ninth Circuit's formulation of the ripeness doctrine. Although Santa Fe attempts to depict the Ninth Circuit decision in this case as exemplifying an aberrant trend in the circuit, the Ninth Circuit's holding that Santa Fe has not presented a concrete controversy ripe for judicial review is merely a fact-specific determination that Santa Fe has not obtained a final decision as to the level of development the City will permit on Santa Fe's property. Because this determination rests on the application of established ripeness rules to a particular set of facts, this case provides no significant issues meriting Supreme Court review.

#### 1. The Ninth Circuit And District Court Rulings That Santa Fe's Action Is Premature Adhere To This Court's Ripeness Decisions.

Santa Fe's broad attack on the Ninth Circuit, while itself unfounded, is particularly unwarranted in this case. The determination that Santa Fe has not presented a concrete controversy ripe for review flows directly from Supreme Court precedent.

The Ninth Circuit, in an unpublished memorandum decision affirming the District Court, concluded that the court lacked jurisdiction to hear Santa Fe's claim because Santa Fe had not yet obtained a final decision as to the type and intensity of

development permitted on its property. *See* Memorandum, App. at A-26 to A-30. This decision faithfully follows the rule established by this Court that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). This Court has further clarified that the ripeness requirement is not satisfied unless the landowner has obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Both the District Court and the Ninth Circuit determined that, on the facts of this case, Santa Fe had not obtained the requisite final and authoritative determination because it has never submitted a development application under the challenged regulations. *See* Order, App. at A-14 to A-24; Memorandum, App. at A-26 to A-30.

In insisting that Santa Fe submit a development application, the Ninth Circuit followed a clear line of Supreme Court precedent. This Court has made clear that landowners challenging an ordinance as effecting a taking of their property present no concrete controversy for the court to adjudicate until they have submitted a development application under the challenged ordinance. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). More recently, the Court has held that landowners have not satisfied the final decision requirement until they have also sought available variances. *Williamson*, 473 U.S. at 187-90 (no final decision where landowner failed to seek available variances after rejection of development application). Moreover, the application must be "meaningful"; rejection of "exceedingly grandiose development plans" does not necessarily constitute a final decision. *MacDonald*, 477 U.S. at 352 n.8, 353 n.9 (taking claim premature where landowner had submitted an application for intensive development but had failed to submit less intensive development proposal that county might approve). The District Court and Ninth Circuit relied on these Supreme Court pronouncements in requiring that Santa Fe submit at least one development application before

invoking the court's jurisdiction. *See* Order, App. at A-18; Memorandum, App. at A-28.

Disagreeing with the lower courts' application of settled law to the facts presented by this action, Santa Fe accuses the Ninth Circuit of deviating from this Court's mandate by employing a mechanical approach. *See, e.g.,* Petition at 13. The only arguments which Santa Fe offers to support this criticism, however, reflect a fundamental misunderstanding of the ripeness doctrine. Santa Fe argues that the Ninth Circuit should have excused Santa Fe from submitting even one application because the challenged ordinances are "confiscatory" and because the regulations are themselves a final determination of the permissible level of development. Petition at i, 11, 18-19. Both arguments, if followed by any federal court, would eviscerate the final decision requirement.

The underlying premise of Santa Fe's ripeness claim is its conclusory allegation that Measure Q is confiscatory. Santa Fe describes the ordinance as "confiscatory" throughout its petition, as if this legal conclusion were a proven fact. *See* Petition at i, 3, 9, 11, 18. Santa Fe confuses the ripeness inquiry and the takings inquiry. *See* Petition at 15-16 & n.7 (mistakenly implying that the absence of a set formula for determining whether a taking has occurred justifies a flexible approach to ripeness). To determine whether a land use regulation effects a taking of a property interest, courts must engage in "ad hoc, factual inquiries" into the particular circumstances of each case. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *MacDonald*, 477 U.S. at 349. The factual nature of the takings inquiry, however, is precisely the reason for the Supreme Court's insistence on the prerequisite of a final decision. As this Court has summarized, "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348; *See also Williamson*, 473 U.S. at 189 n.11 ("[a]bsent a final decision. . . it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed").

Despite this clear distinction between the factual inquiry on the merits and the threshold jurisdictional inquiry, Santa Fe advo-

cates reaching the merits, namely whether an ordinance is confiscatory, to determine whether the final decision requirement is satisfied. *See, e.g., id.* at 17-19. What Santa Fe apparently fails to understand is that a court cannot prejudge whether the level of development permitted under an ordinance "confiscates" a particular property interest until the court knows exactly how much development the governing entity will allow. The final decision determination, of necessity, turns only on the question of whether a permitting authority has arrived at a final and authoritative determination of the level of development permitted on the property at issue. *MacDonald*, 477 U.S. at 348.

Thus, the Ninth Circuit correctly refused to base jurisdiction only on an interested party's interpretation of the very regulation it is challenging. The court adhered to this Court's ripeness decisions when it recognized that it could not determine whether the challenged regulations were in fact confiscatory until Santa Fe submits an application to the City so that the City has an opportunity to apply the ordinance to a particular development proposal.

The Ninth Circuit and District Court also correctly held that Santa Fe cannot claim that an application would be futile merely because the terms of the Waterfront Plans and Measure Q are specific. Although Santa Fe treats this holding as another instance of the Ninth Circuit's alleged "rigid and mechanical ripeness standard," Petition at 19, the Ninth Circuit's decision here too is in accord with Supreme Court precedent.

In *MacDonald*, this Court made clear that a landowner's allegation of futility will not satisfy the final decision requirement if a possibility remains that a governing body will implement its regulation so as to permit development sufficient to survive constitutional scrutiny. 472 U.S. at 352 & n.8. In that case, the landowner had already submitted a development application for intensive residential development on its property and had alleged in state court that further applications would be futile. *Id.* at 352 n.8. The Court accepted the state court's conclusion that requiring an application for less intensive residential development would not be futile because "a meaningful application had not yet been made." *Id.* Similarly, citing *MacDonald*, the Ninth Circuit re-

fused to accept Santa Fe's claim of futility because Santa Fe had not submitted even one application—let alone a meaningful one—under the challenged regulations. Memorandum, App. at A-29.

Requiring Santa Fe to submit a meaningful application following the City's adoption of the Waterfront Plans gives full effect to the Court's directive that federal courts not second-guess how a governing body will in fact respond to a development proposal. In *MacDonald*, this Court indicated that a prediction of an agency's behavior in lieu of an actual decision on a development application does not satisfy the final decision requirement. 477 U.S. at 351. The county in that case had rejected the developer's first application for residential development on the grounds that street access, sewer and water services, and police protection were inadequate; however, the fact that the county's general plan and zoning ordinances technically permitted residential development was enough to dismiss the landowner's allegation that a subsequent application would be futile. *Id.* at 342-43, 352 n.8. The landlord's allegation of futility was "conclusionary" because the county regulations, "*for aught that appears*, would allow development to proceed." *Id.* at 352 n.8 (emphasis added). As in *MacDonald*, the Ninth Circuit correctly refused to base jurisdiction on a mere prediction of futility controverted by the plain terms of the challenged regulation. As Judge Patel, writing for the District Court in this case, aptly stated, "[p]laintiff asks the court to look past the express terms of the enactments and divine their true intent and impact . . . [but] there is simply no circumstance where the court can substitute its speculative judgment for the determination of a planning authority presented with an actual development application." Order, App. at A-22.

*MacDonald* further teaches that a court should avoid constitutional adjudication of a takings claim if the problem could be solved by another development application; the Court found the landowners' takings claim premature because they had not yet availed themselves of procedures that could potentially permit some development. 477 U.S. at 352-53. Thus, in affirming the district court's dismissal of Santa Fe's claim, the Ninth Circuit faithfully followed the dictates of this Court when it determined

that the ripeness doctrine requires Santa Fe to give the City an opportunity to apply its regulations in a manner that will not effect a taking. Memorandum, App. at A-29. Santa Fe distorts this reasoning by treating the court as having decided that an application would be futile "as a practical matter." *See* Petition at i, 11. The court never found that an application would in practice be futile. Indeed, the court determined that an application would not be futile because the terms of Measure Q give the City discretion to apply the ordinance flexibly. Memorandum, App. at A-29 to A-30 & n.3. The court only determined that it would not preempt the City's decision-making process by accepting Santa Fe's mere allegations of futility.[13] *Id.* at A-29 to A-30 & n.3.

The legal standards which the District Court and the Ninth Circuit applied in this case present no issues meriting Supreme Court review. The uniqueness of this case derives not from the legal standards applied but from the lengthy controversy between the parties to this action which the District Court and Ninth Circuit properly reviewed in light of settled law.

**2. The Decision In This Case Provides No Basis For Legal Generalizations.**

Even if the Court were interested in reviewing its ripeness standard in regulatory takings cases, this case would be a poor vehicle for such review because the Ninth Circuit's decision hinges on its interpretation of facts that are not easily generalized for application in other contexts. Although Santa Fe attempts to find a legal hook to justify Supreme Court review, the major issues in this case are whether Santa Fe submitted a meaningful application and whether submission of such an application would be futile, both factual questions specific to this case.

The Supreme Court need not retrace the exhaustive factual analysis that led both the District Court and the Ninth Circuit, exercising *de novo* review, to conclude that Santa Fe has not

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[13] As the Ninth Circuit explained elsewhere, "waiting for a final determination increase[s] the possibility of [the developer and public agency] finding a mutually acceptable solution." *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

attempted to obtain a final decision as to the level of development the City will permit under the regulations.[14] *See, e.g.*, Order, App. at A-14 to A-17; Memorandum, App. at A-26 to A-27. The conclusion reached by both courts, that Santa Fe presents no concrete controversy, is fully justified by the record in this case.

The undisputed record reveals that Santa Fe never submitted a development application under the very land use regulations it challenges as effecting a taking of its property. *See* Order, App. at A-19 to A-20; Memorandum, App. at A-29. Santa Fe obfuscates this pivotal fact by making sweeping generalities and leveling serious, albeit unsubstantiated, charges against the City while omitting relevant facts.[15] *See* Petition at 4-5. For example, Santa Fe refers to a rejected 1970 development proposal but omits mention of the fact that it thereafter initiated litigation against the

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[14] Contrary to Santa Fe's assertion that a court must accept its factual allegations as true, *see* Petition at 2, 24, the court was permitted to weigh the evidence. While a court must accept factual allegations as true when judging the sufficiency of the pleadings for purposes of ruling on a motion to dismiss for failure to state a claim, as a general rule the court "may inquire . . . into the facts as they exist" when ruling on a motion challenging the court's subject matter jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). Where, as here, the motion to dismiss is pursuant to Federal Rule of Civil Procedure 12(b)(1), "no presumptive truthfulness attaches to plaintiff's allegations . . . . [and] the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d. 884, 891 (3d Cir. 1977)). This rule applies when the jurisdictional facts are not intertwined with the merits. *Id.* The rule is applicable in this instance because the jurisdictional question, whether Santa Fe has obtained a final decision as to the permissible level of development, is separate from the question of whether the permissible level of development constitutes a taking.

[15] Santa Fe's Petition largely repeats the unsupported, inflammatory allegations of its complaint, treating them as if they are adjudicated facts. Santa Fe's unsubstantiated claims include accusing the City of acting "in bad faith," (Petition at 4), "manipulating the process to ensure that Santa Fe's applications would ultimately be denied," (*id.* at 5), and rejecting these applications "on sham grounds" (*id.*).

City which lasted for over a decade. *See City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, *cert. denied*, 449 U.S. 840 (1980); *see also* CR 19, Exh. 2 at 87 (Waterfront Plan's description of litigation). During this extended period, there was no proposal under consideration by the City for development of Santa Fe's property holdings along the shoreline.

The other development proposals to which Santa Fe alludes (*see* Petition at 4-6) preceded the completion of the City's extensive planning process which culminated in the City's enactment of the Waterfront Plans and the voters' approval of Measure Q. CR 19, Exhs. 2 and 3; Order, App. at A-15 to A-17. Although Santa Fe attempts to characterize that planning process as a delaying tactic, *see* Petition at 4-5, the process was a serious effort to develop, for the first time, policies governing the one large remaining undeveloped tract in the City. CR 19, Exh. 2, at 89. The process took three years, not an unduly long time to solicit input from public and private interests, formulate appropriate development standards, and conduct an environmental review of the Waterfront Plans. One of the primary purposes of the process, in which Santa Fe played a significant part, was to provide "an appropriate amount of private development to make the Waterfront part of a vibrant urban community." *Id.* at 1.

While the City was in the midst of formulating a detailed land use plan for the Waterfront, Santa Fe attempted to preempt and disrupt the process by filing development applications with the City. Ultimately, so that the City could complete the planning process before approving or rejecting a specific application, the City imposed temporary moratoriums on development permits. CR 1 at ¶¶ 42, 45, 48; Order, App. at A-16.

These actions by the City provide no determination as to the level of development permitted under the challenged regulations, as Santa Fe's proposals preceded enactment of the Waterfront Plans and Measure Q. *See, e.g.*, Order, App. at A-14 to A-17, A-19 to A-20; Memorandum, App. at A-26 to A-27. Santa Fe accuses the Ninth Circuit of requiring "one *more* application," *see, e.g.*, Petition at 15, 21, 26 (emphasis added), when in fact, as the Ninth Circuit found, Santa Fe has yet to submit even a first

application under the challenged regulations. Memorandum, App. at A-29. Further, the City's response to Santa Fe's proposal for more than four million square feet of development cannot be considered a final determination of the type and intensity of development the City will permit. Santa Fe has not yet provided the City with a meaningful application; its proposal for nearly eight times the square footage specified in the regulations certainly does not qualify as meaningful.

Reflecting precisely the flexibility which Santa Fe claims is absent, the District Court noted that it would not blindly require Santa Fe to submit a development application under a new zoning regime if the City had "manipulate[d] the zoning process" as a tactical ploy to avert litigation. Order, App. at A-21 n.2. The record indicated, however, that the City had not acted to deny Santa Fe an opportunity to obtain a final determination from the City on the development it would allow on Santa Fe's waterfront property. Arriving at the same conclusion, the Ninth Circuit found that to present a concrete controversy, Santa Fe must first establish that "*after* Measure Q was adopted, a specific development plan was rejected." Memorandum, App. at A-28 (emphasis added).

Similarly, in rejecting Santa Fe's futility argument, the Ninth Circuit and the District Court relied on the specific history between the parties and the terms of the regulations themselves. As even Santa Fe's present petition reveals, Santa Fe's real disagreement is not with the court's approach to the ripeness doctrine but with its assessment of the fact-specific issue of whether the Waterfront Plans and Measure Q fix the terms of development or give the City flexibility. *See, e.g.,* Petition at 17-19. The District Court and the Ninth Circuit have already resolved this question against Santa Fe, based not on a mechanical approach to ripeness but rather on a careful reading of the regulations.

Santa Fe relies on an unsubstantiated legal conclusion to justify its failure to submit an application under the challenged regulations; it argues that the City never intended to use the planning process to allow development of the property. *See* Petition at 5. The terms of the regulations belie this claim. Because the City

intended to ensure a reasonable economic return to Santa Fe, *see* CR 19, Exh. 2 at 92, it established baseline terms that it believes will provide Santa Fe economically beneficial use of the property. Further, if the City's economic assumptions were to prove incorrect and the adopted Waterfront Plans were not to allow economically viable development of the property, Measure Q provides the City discretion to alter the permissible level of development if necessary to prevent a taking. Measure Q, Section 5, App. at A-48. Measure Q's Section 7 requiring voter approval of amendments to the ordinance does not nullify this grant of discretion because the voters authorized the City to apply the ordinance in such a way as not to deprive Santa Fe of its constitutionally guaranteed property rights. *Id.* Section 7, App. at A-48. Only after examining these provisions of the Waterfront Plans and Measure Q did the district and appellate courts reject Santa Fe's claim that an application would be futile. *See* Order, App. at A-21 to A-22; Memorandum, App. at A-30 n.3.

The Ninth Circuit explicitly indicated that the City's discretion to apply the terms of Measure Q flexibly was important to its conclusion that Santa Fe could not invoke futility. Memorandum, App. at A-30 n.3. In view of the Ninth Circuit's reasoning, Santa Fe distorts the decision by claiming that the Court of Appeals would insist on an application "no matter how certain it may be" that such a step would be futile. *See* Petition at 21. The sole evidence which Santa Fe offers for this misrepresentation of the decision is another distortion: that Santa Fe had succeeded in showing that Measure Q was a final determination. *Id.*

As the foregoing review of the Ninth Circuit and District Court rulings makes clear, the decision in this case rests on detailed analysis of a planning process and regulations unique to this case. Because this analysis cannot be generalized beyond the facts of this case, Supreme Court review would serve no purpose but to provide Santa Fe yet another hearing on the facts. The Supreme Court need not expend scarce judicial resources on this task when the District Court and the Ninth Circuit have already scrutinized the facts and correctly rejected Santa Fe's self-serving reading of the City's land use regulations governing its property.

### B. The Ninth Circuit's Application Of The Ripeness Doctrine Is Entirely Consistent With The Holdings Of This Court And Other Circuits.

Santa Fe attacks not just the outcome in this case but the Ninth Circuit as a whole. *See* Petition at 19-26. In making this sweeping attack, Santa Fe reads the case law selectively and impugns the judicial integrity of the circuit. An accurate reading of the cases does not support Santa Fe's broad generalizations. Contrary to Santa Fe's claim, the Ninth Circuit's approach does not result in needless postponement of ripe claims. *See, e.g.*, Petition at 15. The circuit has not hesitated to find takings claims ripe for review where the facts of the case demonstrate that further attempts to seek a final decision would be futile. *See, e.g., Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989).

Acknowledging these ripeness decisions, as it must, Santa Fe then contradicts itself by complaining of the "divergence of authority" on the circuit, an argument which Santa Fe supports only by its unwarranted accusation that landowners are "at the mercy of the panel" which hears their case. Petition at 19. In fact, Ninth Circuit case law reveals that the circuit, consistent with both this Court's pronouncements and those of other circuits, requires that a landowner either pursue available means of obtaining a final decision or demonstrate that such steps would be futile.

#### 1. The Ninth Circuit Requires Landowners To Obtain A Final Decision As To The Type And Intensity Of Development Permitted On Their Property.

The so-called "Ninth Circuit approach" to which Santa Fe objects merely implements the directives of this Court by requiring a landowner to obtain a rejected development plan and a denial of a variance before challenging the constitutionality of a land use regulation. *See, e.g., Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir.), *cert. denied*, 109 S. Ct. 79 (1988); *Lai v. City & County of Honolulu*,

841 F.2d 301, 303 (9th Cir.), *cert. denied*, 109 S. Ct. 560 (1988); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 377-79 (9th Cir.), *cert. denied*, 109 S. Ct. 134 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988). These decisions follow directly from the Supreme Court's opinion in *Williamson* where the Court held that a landowner had not obtained a final decision because it had failed to apply for available variances after the county in that case had rejected the landowner's development application. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-90 (1985).

This approach is not unique to the Ninth Circuit. In complete accord with the Ninth Circuit, other circuits have held challenges to land use regulations premature on the grounds that landowners had not submitted a development plan or sought variances. *See, e.g., Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988) (remanding taking claim to district court to address whether city's grant of a variance is likely and thus whether claim is premature); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.) (holding constitutional challenge to zoning and annexation decisions unripe because developer had made no formal application and thus had obtained no final decision), *cert. denied sub nom. Alter v. Schroeder*, 109 S. Ct. 226 (1988); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (holding taking claim premature where landowners had not sought a variance and thus had not obtained a final decision).

Not only is Santa Fe wrong in accusing the Ninth Circuit of deviating from this Court's and other circuits' decisions, Santa Fe also misrepresents the standard which the Ninth Circuit employs. *See, e.g.*, Petition at 13-26. In those cases where the Ninth Circuit found a constitutional challenge to a land use regulation premature because landowners had not submitted a development plan or applied for a variance before filing suit, the record demonstrated that these avenues of relief were available. *See Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (as applied taking claim premature because county had suggested ways to remedy the deficiencies in landowners' informal development proposal); *Lai*, 841 F.2d at

303 (takings claim not ripe because landowners had failed to seek a variance which past experience indicated could be obtained); *Shelter Creek Development Corp.*, 838 F.2d at 379 (takings claim not ripe because planning commission's testimony indicated it would "permit some deficiencies in various requirements"); *Kinzli*, 818 F.2d at 1452 & n.2 (takings claim premature because landowners had abandoned their only application and had never applied for special use permits allowed under the terms of the ordinance). Although Santa Fe asserts that the Ninth Circuit employed a mechanical and rigid approach in deciding these cases, *see* Petition at 19-20, elsewhere in its petition Santa Fe admits that these cases were correctly decided because each involved a land use regulation that gave the administrative body "discretion to take some meaningful action in response to a development application or variance request." *Id.* at 11-12.

By contrast, the circuit has not insisted on denial of a formal development application and denial of a variance where doing so serves no purpose. *See Barancik v. County of Marin*, No. 87-1982, slip op. 4055, 4062 (9th Cir. Apr. 19, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, 569-70, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989). In *Herrington*, the court did not define the application requirement rigidly; rather, it pragmatically evaluated whether the Herringtons could claim that the county had rejected a development application. Even though the landowners had never formally completed a development application, the court held that they had satisfied the "rejected development plan" prong of the final decision standard because the county had definitively rejected the Herringtons' incomplete proposal as inconsistent with the general plan. *Id.* at 569.

The Ninth Circuit in *Herrington* also held that landowners need not apply for a variance where the facts indicate that a variance is not "a legally viable option." *Id.* at 570. Although Santa Fe downplays *Herrington* by relegating it to footnotes, *see* Petition at 14 n.6, 20 n.9, the *Herrington* decision evidences the very sensitivity to the facts underlying a takings claim that Santa Fe contends is lacking in the Ninth Circuit.

Similarly, in a decision issued since Santa Fe filed its present Petition, the Ninth Circuit held that a constitutional challenge to a denial of a rezoning application was ripe even though the landowner had not sought a variance. *Barancik*, No. 87-1982, slip op. at 4062. A denial of a variance was not necessary to establish ripeness because the record did not indicate that a variance was available. *Id.*

In light of these cases, the fact that the City has stated that Santa Fe need not apply for a variance to satisfy the final decision requirement is not a "fatal" concession, as Santa Fe claims in its present Petition. *See* Petition at 12. The City has always maintained that Santa Fe's claim is premature not because the company failed to seek a variance but because it has failed to submit even one application under Measure Q when that ordinance allows development. *See, e.g.*, CR 12, at 6-19. The Ninth Circuit apparently did not disagree with this conclusion; it denied Santa Fe's petition for rehearing subsequent to the circuit's modification of *Herrington* and the City's briefing of the issues raised by that case. *See* Answer to Appellant's Petition for Rehearing at 2-8 (discussing implications of modified *Herrington* decision).

**2. The Ninth Circuit Does Not Require Landowners to Engage In Futile Efforts To Obtain A Final Decision.**

The Ninth Circuit does not insist that landowners pursue every technically available avenue of relief if doing so "would be an 'idle and futile act.' " *Kinzli v. City of Santa Cruz*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). Nevertheless, when challenging a regulation as effecting a taking of their property, landowners cannot come within the futility exception simply by arguing that no economically viable development is possible under the ordinance. Such an argument would force the court to reach the merits of the case in the absence of a concrete controversy, thus eviscerating the ripeness requirement. As the Ninth Circuit explained in *Kinzli*,

> We reject the . . . view that futility may be determined, absent any rejected development plan, by inquiring whether

> any beneficial use remains or whether the regulatory regime inhibits the property's marketability. Adoption of such standards would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits.

818 F.2d at 1454. Although a landowner can avoid exhausting all avenues of relief by demonstrating that the permitting authority has definitively determined the level of development it will approve, the landowner must first submit a "meaningful application" before claiming that further efforts to obtain a final and authoritative determination would provide no further clarification and thus be futile. *MacDonald*, 477 U.S. at 352 & n.8; *Kinzli*, 818 F.2d at 1455.

Although Santa Fe objects to this reasoning as creating "a standard in [the Ninth Circuit's] dominant line of cases which can never be satisfied," Petition at 23, Santa Fe glosses over the fact that the Ninth Circuit in several recent cases did indeed find that landowners had satisfied the futility exception. *See Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989). Both cases undercut Santa Fe's argument that the Ninth Circuit employs a rigid and mechanical approach to ripeness. Santa Fe hedges by implying that these decisions differ from the "dominant" line of cases. Petition at 23. Rather than representing a divergence of authority in the circuit, these decisions evidence differing outcomes resulting from application of the same established principles to the particular facts of each case. Further, these opinions are no less "dominant" than others and will probably be more influential on subsequent case law than the unpublished memorandum decision in the case at bar.

*Hoehne* and *Herrington* show that the Ninth Circuit, without further instruction by the Supreme Court, will hear a takings claim if landowners have demonstrated that they received what amounts to a final determination as to the acceptable use of their

property, even if they have not exhausted all avenues of relief. In *Hoehne*, the court emphasized that its determination that the landowners' taking claim was ripe for review turned on the record facts. *Hoehne*, No. 87-2825, slip op. at 2399. The facts showed that a county had rejected the Hoehnes' subdivision application and then immediately downzoned their property. The court reasoned that the landowners had no available avenues of relief, as the county supervisors would not rezone the property to permit the desired development. *Id.* at 2403. The Ninth Circuit held that on these facts, "any further attempt by the Hoehnes to seek relief from the County would have been futile." *Id.* at 2394.

Similarly, in *Herrington*, the facts showed that requiring landowners to submit further applications to the county in that case would have been futile. 857 F.2d at 569-70. The Ninth Circuit found the Herringtons' constitutional challenge ripe because the county had already rejected one application on the grounds of inconsistency with the general plan and county planners had testified that the landowners "had no chance" of obtaining a general plan amendment, the landowners' only available avenue of relief. *Id.* at 569. Explicitly noting that its decision was "based upon repeated and uncontradicted testimony by county officials that the Herringtons' 32-lot proposal could not have obtained approval," the court emphasized that "mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Id.* at 570.

Significantly, the Ninth Circuit had the opportunity to reconsider its decision in this case in light of *Herrington*, as Santa Fe's petition for rehearing was before the court when the court published its modified opinion in *Herrington*. After considering the City's discussion of the implications of *Herrington* for Santa Fe's futility claim, *see* Answer to Appellant's Petition for Rehearing at 2-8, the court denied a rehearing of the case. App. at A-32.

Contrary to Santa Fe's attempt to characterize the Ninth Circuit as the lone aberration, *see, e.g.*, Petition at 17, 22, no circuit has applied the futility exception where the developer has not submitted an application and thus has not received a final and authoritative determination of the permissible level of develop-

ment. The Seventh Circuit explicitly relied on *Kinzli* and endorsed its reasoning. *Unity Ventures v. County of Lake*, 841 F.2d 770, 775-76 (7th Cir.), *cert. denied sub nom. Alter v. Schroeder*, 109 S. Ct. 226 (1988). Rejecting the developers' claim of futility because the landowner had not submitted a development application in that case, the Seventh Circuit explained,

> If the plaintiff had presented a formal application . . . , then the Village could have made a reasoned decision. . . . And if the Village still denied the application, a court would have a basis on which to evaluate the impact and extent of the Village's denial. At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

*Id.* at 776. The Tenth Circuit has similarly rejected a landowner's claim of futility where the landowner had made no attempt to "pursue compromise with the City that would allow some level of development." *Landmark Land Company of Oklahoma v. Buchanan*, Nos. 85-2458, 85-2538 (10th Cir. Nov. 30, 1988) (1988 U.S. App. LEXIS 16105, 11).

The Eleventh Circuit cases which Santa Fe cites in an effort to demonstrate a conflict among the circuits are also compatible with the Ninth Circuit's reasoning in its ripeness cases. *See* Petition at 17. The Eleventh Circuit in *A.A. Profiles v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3682 (Apr. 17, 1989), employs the same reasoning as the Ninth Circuit in *Hoehne*. In *A.A. Profiles*, the landowner had submitted an application for proposed development which the city conditionally approved. When the landowner violated the conditions of approval, the city temporarily suspended the approval and subsequently rezoned the property. *Id.* at 1485. As in *Hoehne*, the rezoning definitively prevented the landowner from pursuing its proposed business and thus provided the court with a final determination on which to base its takings inquiry. *Id.* at 1487. Similar to the Ninth Circuit in *Herrington*, the Eleventh Circuit has not required a landowner to seek a variance to satisfy the final decision requirement where the city conceded that seeking a

variance would have been futile under the terms of the ordinance. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 & n.3 (11th Cir. 1987).

Santa Fe also glosses over a key distinction between these cases and its own; in the Eleventh Circuit cases, the city's actions occurred *after* the city had taken action on a development application. *A.A. Profiles*, 850 F.2d at 1485 (city initially approved company's wood-chipping business); *Corn*, 816 F.2d at 1515 (city denied approval of landowner's site plans).

Given the lack of merit in Santa Fe's characterization of the Ninth Circuit, Santa Fe makes a last ditch effort to save its claim by attacking the judicial integrity of the Ninth Circuit. Petition at 14, 19. Santa Fe's suggestion that the results in Ninth Circuit cases depend on the composition of the panel is wholly unwarranted, as the Ninth Circuit's rulings in all its ripeness cases properly require a final decision on which the trial court can base its evaluation of a takings claim.

Further, any suggestion that the Ninth Circuit is split is also factually wrong insofar as the same judges have ruled differently in different cases. One example is the case at bar. Judge Choy, one of the members of the panel holding Santa Fe's claim premature, authored the *Herrington* decision accepting the landowners' claim of futility. *See Herrington*, 857 F.2d 567 (9th Cir. 1988) (Choy, J.). *Compare, also, Lai v. City and County of Honolulu*, 841 F.2d 301 (9th Cir.) (Schroeder, J., joined by Skopil, J. and Aldisert, J.) (dismissing complaint as unripe because landowner failed to apply for a variance), *cert. denied*, 109 S. Ct. 560 (1988) *with Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989) (Aldisert, J., joined by Brunetti, J. and Leavy, J.) (holding complaint ripe because further attempts to seek relief from county would have been futile).

As this review of Ninth Circuit case law makes clear, Santa Fe's attempt to blame the outcome of its case on a rigid or, alternatively, conflicting Ninth Circuit approach finds no support in the cases. The Ninth Circuit dismissed Santa Fe's claim for lack of ripeness, despite precedent for a finding of futility, because

the facts showed that Santa Fe does not yet have a final decision from the City on the permissible level of development. Whereas in *Hoehne* and *Herrington* the court had concrete information as to how much development would be permitted because no further application would change the permitting authority's determination, the District Court and the Ninth Circuit in Santa Fe's case concluded that the City had not issued any definitive determination of the degree of development it will permit on Santa Fe's property. Because avenues of relief exist under the terms of the Waterfront Plans and Measure Q that Santa Fe has not pursued, the Ninth Circuit correctly affirmed the District Court's determination that Santa Fe's regulatory takings claim is not ripe for judicial consideration.

## CONCLUSION

For all of the foregoing reasons, this Court should deny Santa Fe's petition for certiorari.

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Respectfully submitted,

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